Petition

81-997

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No. _____

In The

Supreme Court of the United States

October Term, 1981

RICHARD CHARLTON,

Petitioner,

v.

CORTEZ DEVELOPMENT CORPORATION, an Arizona corporation; SEVENTH CAMEL ASSOCIATES, an Arizona joint venture; and JAMES P. DUNLAVEY, Chapter XI Receiver,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John P. Frank
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QUESTIONS PRESENTED FOR REVIEW

1. Where a Bankruptcy Court orders a sale, the order is appealed from, and the sale takes place, is the appeal from the order of sale moot in the absence of consideration of the good faith of the purchaser?

2. In a case under Chapter XI of the Bankruptcy Act, could the Bankruptcy Court approve a plan proposed by the Receiver?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS

The parties who actively took part in the proceedings in the United States Court of Appeals were Debtor-Appellant Richard Charlton and Appellee Cortez Development Corporation. Other parties who were listed in the proceedings below as possibly having an interest in the property which is the subject of this appeal include: First Arizona Mortgage & Investment Company and Arizona Title Insurance and Trust Company; Edward F. Babo and Norma Babo; Smith & Feola; Jerry Doyle; First National Bank of Arizona; General Leasing Co.; Goettl Air Conditioning, Inc.; Internal Revenue Service; Orvel M. Johnston and Mary Johnston; Martori, Meyer, Hendricks & Victor; Phoenix Security Systems, Inc. Rabern Enterprises, Inc.; Restaurant Development Corporation; Arthur Schreiber; Horace and Ethel Steele; Don M. Tyler; Morey Levine, Byron Lasky and Camelback Theaters, Inc.; William C. Penn.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. Due Process of Law and the Bankruptcy Statutes Themselves Require that the Debtor Have a Hearing on the Good Faith of a Sale of His Property.	5
II. The Bankruptcy Court Could Not Order a Sale Other Than Pursuant to a Debtor-Inspired Plan.	9
CONCLUSION	11
Appendices	
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1
Appendix E	E-1
Appendix F	F-1
Appendix G	G-1
Appendix H	H-1
Appendix I	I-1
Appendix J	J-1
Appendix K	K-1

Appendix L **L-1**
Appendix M **M-1**
Appendix N **N-1**

TABLE OF AUTHORITIES

Cases:	*Page*
Chesebro v. Los Angeles County Flood Control Dist., 306 U.S. 459, 59 S. Ct. 622, 83 L.Ed 921 (1939)	9
In re Rock Industries Machinery Corp., 572 F.2d 1195 (7th Cir. 1978)	6
In re Webcor, Inc., 392 F.2d 893 (7th Cir.) *cert. denied*, 393 U.S. 837, 89 S. Ct. 113 (1968)	6
Local Joint Executive Board, AFL-CIO v. Hotel Circle, Inc., 419 F. Supp. 778 (S.D. Cal. 1976)	6, 7
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)	9
Statutes:	
11 U.S.C. § 363(m)	2, 8, 9
11 U.S.C. § 363(n)	2, 8, 9
11 U.S.C. § 1121	9
28 U.S.C. § 1254(1)	2
Other:	
Bankruptcy Act:	
Chapter XI	2, 5, 9, 10
Chapter XI § 376 (11 U.S.C. § 776)	2, 10
Bankruptcy Rules:	
11-36(a)	9
11-42(b)	10
11-62	5
805	5
U.S. Const. Amend. V	2

House Report No. 95-959, 95th Cong., 1st sess. 344 (1978) 9

Senate Report No. 95-989, 95th Cong., 2nd Sess. 55 (1978) 9

OPINIONS BELOW

The Bankruptcy Court order approving sale of the Debtor's property is attached as Appendix "B." The Bankrutpcy Court order denying Charlton's motion for reconsideration of the order authorizing sale is attached as Appendix "A." The District Court judgment affirming the order approving sale is attached as Appendix "D." The District Court judgment denying the motions for reconsideration and for stay pending appeal is attached as Appendix "E." The Bankruptcy Court order regarding the extent to which the Alberding contract would provide for payment of the creditors is attached as Exhibit "G." The Bankruptcy Court order setting the one million dollar bond requirement is attached as Appendix "H." The Bankruptcy Court order denying Charlton's motion for the setting of a separate bond in favor of Cortez Development Corporation is attached as Appendix "I." The Ninth Circuit order dismissing the appeal as moot is attached as Appendix "K." The District Court order vacating the District Court judgment appealed from and remanding to the Bankruptcy Court for similar action is attached as Appendix "J." The Ninth Circuit order denying the petition for rehearing is attached as Appendix "L."

JURISDICTION

Petitioner Richard Charlton filed a proceeding under Chapter XI of the Bankruptcy Act on May 7, 1979. On February 12, 1980, the Bankruptcy Court entered an order approving sale of substantially all of Charlton's property. On February 20, 1981, Charlton filed a notice of appeal to the District Court. On April 8, 1981, the District Court entered judgment affirming the order approving sale. On April 14, 1981, the District Court entered judgment denying Charlton's motions for reconsi-

deration and for stay pending appeal. On April 15, 1981, Charlton filed his notice of appeal to the United States Court of Appeals for the Ninth Circuit. On August 5, 1981, the Ninth Circuit entered judgment dismissing the appeal for mootness. On August 18, 1981, Charlton timely petitioned for rehearing. On August 28, 1981, the Ninth Circuit entered judgment denying Charlton's petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are U.S. Constitution Amendment V; 11 U.S.C. § 363(m); 11 U.S.C. § 363(n); 11 U.S.C. § 1121; § 376 of the Bankruptcy Act (11 U.S.C. § 776).

STATEMENT OF THE CASE

This Petition arises out of a Chapter XI case under the Bankruptcy Act, which was initiated by Petitioner Richard Charlton ("Charlton"). The principal asset of the estate was Charlton's valuable real property in Phoenix, Arizona.

On November 24, 1980, Charlton filed a plan of arrangement based upon a sale of the property to Mr. C. H. Alberding ("Alberding"). Before the confirmation hearing on the proposed plan could take place, the Receiver filed a separate application to sell the same property to Respondent Cortez Development ("Cortez"). Charlton opposed the sale to Cortez, contending that the Alberding offer was essentially equal to the Cortez offer from the standpoint of creditors, that a Chapter XI plan of arrangement could be proposed by the debtor only, and that the Alberding offer permitted him to retain an interest in the property whereas the Cortez offer did not.

Upon consideration of these matters, on February 12, 1981, the Bankruptcy Court entered an order approving sale to Cortez. See Appendix B.

The order was duly appealed to the District Court and, upon affirmance, to the Ninth Circuit Court of Appeals. See Appendices C, D, E, and F. That Court stayed the sale for a short time conditional upon the posting of a bond by Charlton in the amount of $40,000 "to secure the creditors and Cortez Development Corporation for any damages that may be caused by this delay." See Appendix M. The bond was posted and the matter was remanded for consideration by the Bankruptcy Court of the extent to which the Debtor's proposal would permit prompt payment of creditors.

On remand, the Bankruptcy Judge made various rulings which are challenged by the Debtor and concluded that the Debtor's proposal fell short of permitting prompt payment to the nondeferring creditors. See Appendix G. The Bankruptcy Judge then certified the original appeal back up to the Circuit with the requested findings. The Circuit thereupon entered a further order: (1) staying the sale pending appeal; (2) conditioning the stay upon the filing by the Debtor of "a bond in an amount that is fully adequate to pay all creditors"; (3) remanding the matter to the Bankruptcy Court to determine the amount of the bond and the time within which it must be posted, and, (4) establishing an accelerated briefing schedule for the Ninth Circuit appeal. See Appendix N.

At this point, the Bankruptcy Court set a bond of one million dollars, gave the Debtor a short time in which to post it, and stayed the sale meanwhile. See Appendix H. It will be observed from the language of the remand by the Circuit that the bond was to secure creditors only, and the Debtor offered such a bond. That bond would not have secured the potential alternative purchaser, Cortez. The Debtor tendered a cash bond in the amount of one

million dollars payable to creditors of the estate which was rejected by the Bankruptcy Court because it did not extend to Cortez. The question of the adequacy of the bond was brought back to the Circuit by appropriate interim proceedings, and the Circuit declined to intervene further. The effect of the Bankruptcy Court's rejection of the bond was that the stay expired and the sale went forward. The property was in fact not purchased by Cortez, but by its nominee, a joint venture called Seventh Camel Associates. As of the date of sale, the appeal on the merits of the order approving sale had progressed to the point that the debtor-appellant had filed his opening brief.

On June 23, 1981, five days after the sale, Cortez moved to dismiss the Debtor's appeal for mootness. Charlton resisted the motion on the ground that there was no factual showing that Seventh Camel was a good faith purchaser of the property and that there was some evidence of an absence of good faith. That evidence is of sufficient consequence to the merits of Charlton's argument that we repeat a portion of it here. Charlton was prepared to post an irrevocable $1,000,000 letter of credit in favor of both the creditors and Cortez. Learning of this fact, Cortez contacted Alberding (the purchaser of the letter of credit) and persuaded him to delete Cortez from the letter of credit by claiming that Cortez might suffer $900,000 damage as a result of the stay. Cortez then relied upon the deletion in objecting to the bond. The bond was rejected and the sale went forward. Since Cortez did not purchase the property, the good faith in its protestation of damage is arguable. The Debtor offered evidence that reliance upon this now palpably dubious claim of damage was the controlling factor in the failure to post the bond. This is not to say, either in a neutral statement of facts or later in the argument portion of this petition, that Cortez lied; it is to say that a legitimate question of

good faith was put into issue by events supervening between the time of appellant's opening brief and the time of the motion to dismiss for mootness.

On August 5, 1981 the Ninth Circuit did dismiss the appeal as moot "with direction to vacate the judgment appealed from and to remand the matter to the bankruptcy court for appropriate action." See Appendix K. In short, the lower courts were directed to vacate the order authorizing the sale, the sale having in fact taken place.

REASONS FOR GRANTING THE WRIT

I. *Due Process of Law and the Bankruptcy Statutes Themselves Require that the Debtor Have a Hearing on the Good Faith of a Sale of His Property.*

The mooting of this appeal raises important questions which warrant determination by this Court:

(a) Is a bankruptcy debtor denied due process of law when he is deprived of a hearing on the good faith of a sale of his property simply because the property is sold out from under him before the good faith question can be determined?

(b) Is an objecting debtor entitled under the Bankruptcy Act and Code to a determination of the good faith of a sale?

We deal with these problems in reverse order.

While this sale was made under the old Bankruptcy Act, in this respect the principles of the new Bankruptcy Code are the same and we carry them forward.

The principle that a sale to other than a good faith purchaser does not moot an appeal is found in Bankruptcy Rule 805 which is made applicable to Chapter XI proceedings by Bankruptcy Rule 11-62. A good faith purchaser is one who purchases the assets for value, in good faith, and without notice of adverse claims. *In re Rock*

Industries Machinery Corp., 572 F.2d 1195 (7th Cir. 1978). Whether or not a purchaser has acted in good faith is a question that involves a mixture of both law and fact. Fraud, collusion between the purchaser and other bidders or the Trustee, or an attempt to take grossly unfair advantage of other bidders can all destroy a purchaser's good faith status. *See, e.g., In re Rock Industries Machinery Corp., supra,* at 1198:

> The requirement that a purchaser act in good faith, of course, speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

See also In re Webcor, Inc., 392 F.2d 893 (7th Cir.), *cert. denied,* 393 U.S. 837, 89 S. Ct. 113 (1968).

Notice of adverse claims can also destroy good faith purchaser status. See *In re Rock Industries Machinery Corp., supra.* A purchaser has such notice if he has actual knowledge of defects in the title or knowledge of such facts and circumstances as would have put a man of ordinary circumspection on inquiry. *In re Rock Industries Machinery Corp., supra.*

Moreover, although under the applicable Rules of Bankruptcy Procedure mere knowledge of the pendency of an appeal does not deprive the purchaser of good faith status, such knowledge may be relevant in determining the purchaser's good faith status. *See, e.g., Local Joint Executive Board, AFL-CIO v. Hotel Circle, Inc.*, 419 F. Supp. 778, 783 (S.D. Cal. 1976):

> Under the provisions of rule 11-62(2), the sale to a "good faith" purchaser will not be disturbed by a modification, on appeal, of an order approving the sale of property. Absent a stay of the order approving the sale, the sale to a

> good faith purchaser will not be affected. However, the rule does not shield a purchaser who has not proceeded in good faith. Mere knowledge of the pendency of an appeal does not deprive the purchaser of the protection of rule 11-62(2), but knowledge may be relevant in determining the purchaser's good faith status.

In the instant case, Charlton would have posted the required bond and obtained the necessary stay if Cortez had not made the claim that it stood to lose $900,000 by reason of the stay. Yet, Charlton never had the opportunity to conduct discovery and be heard on the bad faith of Cortez and its nominee. A hearing would have enabled Charlton to inquire into the relationship between Cortez and Seventh Camel, the truth of the claim that Cortez itself stood to lose $900,000, and Seventh Camel's knowledge of certain other adverse claims to the property.

By denying the opportunity for a hearing on the good faith issue, the Ninth Circuit impliedly made it possible for a purchaser fraudulently or collusively to acquire an asset from a Debtor in Possession or Trustee in Bankruptcy at far less than the market price or on terms otherwise inimical to the estate. If the objecting party could not post whatever bond might be required as a condition of a stay order (and what Bankruptcy debtor ordinarily has the financial wherewithal to purchase such a bond?), the appeal would be dismissed as moot without any inquiry into the fraud or collusion.

This disturbing result is not a matter of mere historical interest, which disappeared with the adoption of the new Bankruptcy Code. To the contrary, in the new Bankruptcy Code, Congress has expressly adopted the same good faith purchaser qualification:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under

such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

The trustee may void a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in voiding such sale or recovering such amount.

Sections 363 (m) and (n) of the Bankruptcy Code; 11 U.S.C. §§ 363(m) and (n). How could the trustee void such a sale in the absence of a hearing procedure?

The legislative history reflects Congressional concern with the kind of abuses outlined above:

Subsection (1) [should be m] protects good faith purchasers of property sold under this section from a reversal on appeal of the sale authorization, unless the authorization for the sale and the sale itself were stayed pending appeal. The purchaser's knowledge of the appeal if irrelevant to the issue of good faith.

Subsection (m) [should be n] is directed at collusive bidding on property sold under this section. It permits the trustee to void a sale if the price of the sale was controlled by an agreement among potential bidders. The trustee may also recover the excess of the value of the property over the purchase price, and may recover any costs, attorney's fees, or expenses incurred in voiding the sale or recovering the difference. In addition, the court is authorized to grant judgment in favor of the estate and against the collusive bidder if the agreement controlling the sale price was entered into in willful disregard of this subsection. The subsection does not spec-

> ify the precise measure of damages, but simply provides for punitive damages, to be fixed in light of the circumstances.

House Report No. 95-959, 95th Cong., 1st Sess. 344 (1978); Senate Report No. 95-989, 95th Cong., 2d. Sess. 55 (1978).

Unless the Trustee or Debtor in Possession is given the opportunity to develop and prove the facts constituting such fraud or collusion, the good faith qualification contained in Sections 363(m) and (n) of the Bankruptcy Code is, for all practical purposes, meaningless. There simply must be an opportunity for discovery, a hearing, and a judicial determination on the good faith issue.

The quick sale of this property before the Debtor could have a hearing on a bona fide issue deprives him of his day in court. A hearing is a constitutional right under the due process clause. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Chesebro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 59 S. Ct. 622, 83 L. Ed. 921 (1939).

II. *The Bankruptcy Court Could Not Order a Sale Other Than Pursuant to a Debtor-Inspired Plan.*

Only a Debtor could propose an arrangement under Chapter XI of the Bankruptcy Act. *See* Bankruptcy Rule 11-36(a). The law has been changed substantially in this regard. Now, after a brief exclusivity period in which only the Debtor can propose a plan, other interested parties may also propose a plan. See § 1121 of the Bankruptcy Code; 11 U.S.C. § 1121. Nonetheless, the life span of the Code has been very short. It became effective only two years ago, on October 1, 1979, and does not apply to cases filed before that time. While we do not have hard statistics as to the number of cases filed prior to the ap-

plicable date of the Bankruptcy Code, the normal life of an arrangement proceeding is often quite lengthy. There must be thousands of cases in the courts as to which it is improper to apply the provisions of the new Code retroactively.

In this case, the Receiver wrongfully attempted (thus far successfully) to apply the Bankruptcy Code retroactively to a case that was controlled by the Bankruptcy Act. He, in effect, thrust a plan of arrangement on Charlton in the face of Charlton's own competing plan.

If the Receiver felt that the sale and plan of arrangement proposed by Charlton was improper, his remedy was an objection at the hearing on confirmation or a motion for either dismissal of the Chapter XI proceeding or adjudication of Charlton as a bankrupt. *See* Section 376 of the Bankruptcy Act and Bankruptcy Rule 11-42(b). Under Bankruptcy Rule 11-42(b), the Court may enter an order dismissing the case or adjudicating the debtor a bankrupt for want of prosecution or if confirmation of a plan is denied. Until such dismissal or adjudication, the debtor is entitled to proceed to propose a plan. If the plan is for any reason improper, the debtor is entitled to attempt to restructure the plan. By permitting sale over his objection, Charlton was deprived of an opportunity to promulgate a plan without any of the findings required by Section 376 and Rule 11-42(b).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 25th day of November, 1981.

LEWIS AND ROCA

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Counsel of Record for Petitioner

Appendix A — In the United States Bankruptcy Court for the District of Arizona.

IN RE:

RICHARD CHARLTON, Debtor.	NO. 79-890 PHX VDM Adversary No. "L"
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona Corporation, et al., Defendants.	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER AUTHORIZING SALE TO CORTEZ DEVELOPMENT CORPORATION.

After careful consideration, this Court, being mindful of the necessity for confidence in the consistancy of its rulings,

IT IS ORDERED that the motion for reconsideration of Order authorizing sale to Cortez Development Corporation is denied.

DATED this 11th day of February, 1981.

/S/Vincent D. Maggiore
VINCENT D. MAGGIORE
U.S. Bankruptcy Judge

Copies mailed this 11th day of February, 1981 to:

[Names and Addresses Deleted].

Appendix B — United States Bankruptcy Court
District of Arizona.

In re	
	CASE NO. 79-890 PHX VM
	ORDER APPROVING SALE OF REAL PROPERTY FREE AND CLEAR OF LIENS AND ENCUMBRANCES WITH LIENS AND ENCUMBRANCES TO ATTACH TO PROCEEDS AND
RICHARD CHARLTON,	
Debtor.	APPROVAL OF COMPROMISE SETTLEMENT WITH LESSEES
	(This Order is to be filed in both the Administrative file and Adversary "L").

The above matters, having come before the Court, upon the Receiver's complaint to sell real property free and clear of liens and encumbrances, with liens and encumbrances to attach to the proceeds and Receiver's application to sell real property free and clear of liens and encumbrances, with liens and encumbrances to attach to the proceeds, and upon the joint application of the Receiver and the Lessees to compromise the claims of Morey Levine, Byron H. Lasky, dba Sombrero Playhouse Company and Camelback Theatres, Inc., and such matters having been properly noticed to creditors and all other interested parties by notice of sale dated January 13, 1981, setting the hearing upon Receiver's application to sell property and Receiver's proposal to compromise and

settle claims. Present at said hearing were James P. Dunlavey, Receiver, together with his attorney, Jon N. Vogel; Richard Charlton, Debtor, together with his attorney, Gerald Smith; Peter Rathwell, representing General Leasing Company; Michael C. Pierce, representing Cortez Development Corporation; William Piatt, representing Enterprise Leasing Company; Anthony Lucia and Ronald Warnicke, representing Morey Levine and Byron Lasky; Tim Barton representing First Arizona Mortgage and Investment Company; Gary Keltner, representing Mr. Alberding together with approximately twenty (20) creditors being present personally and through their counsel, and the Court having heard the argument of counsel and statements by the Debtor and others and being fully advised, the Court makes the following findings:

1. That the Debtor commenced these precedings as a Chapter XI proceding by filing a petition on May 7, 1979, and the first meeting of creditors was held on June 12, 1979, at which time the Debtor appeared and was examined, and such first meeting of creditors was then continued to August 3, 1979, at which time such first meeting of creditors was again held and continued upon each of the following dates: September 6, 1979, September 20, 1979, October 3, 1979, November 9, 1979, December 20, 1979, January 30, 1980, April 7, 1980, June 16, 1980, July 1, 1980, September 8, 1980, October 6, 1980, October 10, 1980, December 10, 1980, January 19, 1981, and February 2, 1981, at which continued first meeting of creditors, the Court concurrently heard the applications herein. Interested parties and counsel were heard at all continued meetings.

2. That an emergency meeting of creditors was requested by the Receiver, noticed to all creditors, and held on April 22, 1980.

3. That no plan was filed by the Debtor, or anyone on his behalf, for a period of approximately one (1) year, and that upon the filing of a plan, such plan failed because it did not contain the requisite number of acceptances which resulted in an Order of Adjudication, dated September 11, 1980.

4. That the Debtor, upon a motion to reconsider, was granted sixty (60) days in which to file a plan and that a Second Amended Plan was filed with the Court within said sixty (60) days, but there are serious and substantial problems connected therewith, including the following:

a. The Second Amended Plan includes within the same classification unsecured creditors of the Debtor, as well as relatives and insiders who have been characterized in open court by the Debtor as "investors".

b. That said plan failed in having the requisite acceptances if said relatives and "investors" are not counted and that acceptances by relatives and "investors" were conditioned on being treated as a different class from unsecured creditors generally.

c. That Richard Charlton, the Debtor, has attempted to amend the Second Amended Plan in order to provide that the relatives and insiders defer their rights under said plan, but that no formal amendment to said plan has been filed or approved by the Court and that the Second Amended Plan fails in obtaining enough acceptances if said relatives and "investors" are not in the same class.

d. That no written amendment to the Second Amended Plan has been filed, although proper and adequate notice was given to all parties.

e. That the offer to purchase for the sum of ONE MILLION ONE HUNDRED SEVENTY FIVE THOUSAND DOLLARS ($1,175,000.00) brought before the Court by the Receiver will result in a substantially larger payment to unsecured creditors than would result under the Debtor's Second Amended Plan as filed and as orally amended at the hearing.

f. The Court further finds and concludes upon the record of proceeding held December 10, 1980, in connection with a duly noticed hearing to determine acceptances of the Second Amended Plan, that the Second Amended Plan, even as the Debtor might propose to amend it, is not feasible and is not fair and equitable.

5. The Court further finds and concludes that it is in the best interest of the creditors that the application for sale free and clear of liens and encumbrances with liens and encumbrances to attach to the proceeds be granted in view of the considerations set forth at the various hearings and proceedings before this Court including the hearing on February 2, 1981, and specifically in view of the following:

a. The Receiver was directed by the Court at several earlier continued first meetings to solicit offers for the sale of real property, and no formal objection to said solicitation was filed or lodged by the Debtor, or anyone else, prior to the application to sell free and clear of liens and encumbrances.

b. The high interest rate on secured claims has caused the claims of the secured creditors to increase rapidly and to jeopardize the security of the unsecured creditors and junior secured creditors.

c. Cortez Development Corporation was unwilling to keep its offer open beyond the February 2, 1981, hearing date unless the sale were forthwith approved and confirmed and there were no other purchasers willing to make a purchase offer at said sum despite the diligent efforts of the receiver to sell said property.

d. The proposals by the Debtor were vague, uncertain, conditional, and predicated upon amendments to the Second Amended Plan that were not feasible.

e. No unsecured creditor, except relatives of the Debtor, characterized in open court by the Debtor as "investors" opposed the proposed sale. All other unsecured creditors who appeared at the meeting or in writing supported said sale.

f. Neither the Debtor, nor the Debtor's purchaser, under his proposed Second Amended Plan, were willing to make a TWENTY THOUSAND DOLLAR ($20,000.00) earnest money deposit with the Receiver to assure the Court that the offer under the Second Amended Plan would equal or improve the purchase offer which was before the Court.

6. The Court further finds that the Receiver's application to compromise the lease was properly noticed, and no objections were made.

IT IS HEREBY ORDERED:

1. That Cortez Development Corporation is the highest and best bidder, to purchase the real property described on Exhibit "A" attached, for the sum of ONE MILLION ONE HUNDRED SEVENTY FIVE THOUSAND DOLLARS ($1,175,000.00), as more fully set forth in the purchase contract and receipt dated February 3, 1981, and attached hereto and marked as Exhibit "B",

and said sale is hereby approved and confirmed in accordance with its terms.

2. That the Receiver is granted authority to execute such instruments as may be necessary to convey good title to the purchasers.

3. That said sale shall be free and clear of all liens and encumbrances of any kind, except only subject to the easements of record now showing on the preliminary title report.

4. That proceeds from said sale shall be held by the Receiver, subject to the claims of secured creditors as hereinafter allowed by order of this Court.

5. That the compromise with the Lessees, Morey Levine and Byron H. Lasky, in sum of FORTY TWO THOUSAND FIVE HUNDRED DOLLARS ($42,500.00) be and the same is hereby approved, such sums to be paid from the proceeds of the sale of real property approved herein.

6. That the Clerk shall file this order in both the Administrative file and in Adversary "L".

DATED this ____ day of _____ , 1981.

_____

VINCENT D. MAGGIORE
United States Bankruptcy
Judge

COPY of the foregoing
mailed on this
10th day of February,
1981, to:

[Names and Addresses Deleted].

Appendix C — The United States Bankruptcy Court
District of Arizona.

In re: RICHARD CHARLTON, Debtor. JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	No. 79-890 PHX VDM (This Notice is to be filed in both the Administrative file and Adversary "L" file)

Notice of Appeal to District Court

Debtor, Richard Charlton, appeals to the District Court from the following orders entered by the United States Bankruptcy Court:

February 11, 1981	Order Denying Motion for Reconsideration of Order Authorizing Sale to Cortez Development;
February 12, 1981	Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances with Liens and Encumbrances to Attach to Proceeds and Approval of Compromise Settlement with Lessees

Appendix C-2

The parties to the orders appealed from and the names and addresses of their respective attorneys are as follows:

[Names and Addresses Deleted].

DATED this 20th day of February, 1981.

LEWIS AND ROCA

By /S/Neal L. Wolf

Gerald K. Smith
Neal L. Wolf
Attorneys for Appellant
100 West Washington
Phoenix, Arizona 85003

Copy of the foregoing hand delivered this 20th day of February, 1981 to:

[Names and Addresses Deleted].

Appendix D — In the United States District Court for the District of Arizona.

In re: RICHARD CHARLTON Debtor.	No. Civ. 81-295 Phx. WPC
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	MEMORANDUM AND ORDER

In this expedited appeal, the Chapter XI debtor challenges the Bankruptcy Court's order which (1) approved a sale of realty constituting substantially all of the debtor's assets and (2) approved a compromise settling a dispute over a theatre's lease to the property. Due to the necessity of a prompt decision, this Court will forego summarizing the underlying facts and its discussion of the legal issues will be brief.[1]

Relying on *In re Pure Penn, Inc.*, 188 F.2d 851 (1951), the appellant argues that absent an emergency, a sale of substantially all of the debtor's assets in a Chapter XI proceeding is improper. This Court entertains serious doubts as to whether this issue was raised before

[1]Neither counsel requested oral arguments and it is deemed unnecessary by the Court.

the Bankruptcy Court.[2] Had this issue been raised, the debtor would have argued himself out of court if he had urged the Bankruptcy Court to apply the principles set forth in *Pure Penn*. The Second Circuit in *Pure Penn* held that, absent an emergency, an order approving a sale of substantially all of the debtor's assets was not proper in a Chapter XI proceeding, *even where the sale was coupled with a plan of arrangement*. 188 F.2d at 853-55. Thus assuming that *Pure Penn* is good law in the Ninth Circuit, the Bankruptcy Court could not have approved the Alberding offer, urged by the debtor, if at least one creditor objected. *See 8 Collier on Bankruptcy* ¶ 3.16[3], at 223 (14th ed. 1978).

In this regard, it is irrevelant that under some arrangement between himself and Alberding, the debtor might "assist in the development" of the property and be entitled to "a 49% profit." In contrast to the situation in *In re Whitman Center, Inc.*, 285 F. Supp. 199, 207 (C.D. Cal. 1968), the Alberding offer contemplates a sale of the entire property, rather than a sale of a one-half interest as in *Whitman*. Therefore, by urging the Bankruptcy Court to approve the Alberding offer instead of the Cortez offer, the debtor either waived the *Pure Penn* argument or is estopped from so arguing on appeal.

Second, the debtor argues that the theatre lease dispute was compromised without a hearing. Under Bankruptcy Rule 919, the Bankruptcy Court is empow-

---

[2]The portion of the record cited by the appellant in support of its contention that this issue was raised before the Bankruptcy Court is hardly helpful to the debtor. At best, the argument raised there is that such a sale may not be used to prevent a debtor from having his proposed plan of arrangement considered by the Bankruptcy Court. Ironically, the *Pure Penn* argument was first fully "raised" by Judge Maggiore after he had decided to approve the Cortez offer. Doc. 213, R.T. at 54.

ered to approve a compromise or settlement "after hearing on notice to creditors." The Cortez offer contemplated a compromise of the theatre lease dispute. In view of the fact that these two issues are so intertwined, this Court sees no reason why the hearing of February 2, 1981 was in any way insufficient.

The Bankruptcy Court's orders of February 11 and February 12, 1981, appealed from are AFFIRMED.

This Court's order of March 24, 1981, enjoining the receiver and the purchaser Cortez Development Corp. from closing the transaction, is quashed.

DATED April 8, 1981.

/S/William P. Copple
United States District Judge

Appendix E — United States District Court
for the District of Arizona.

IN THE MATTER OF
RICHARD CHARLTON,
BANKRUPT.

CIV-81-295 Phx.

JUDGMENT

This action came on for (hearing) before the Court, Honorable Wm. P. Copple, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that both motions for reconsideration and for stay pending appeal are denied in all respects.

Dated at PHOENIX, ARIZONA, this 14th day of April, 1981.

W. J. Furstenau
Clerk of Court

By F. Daudet
Deputy Clerk

Appendix F — In the United States District Court for the District of Arizona.

In Re RICHARD CHARLTON, Debtor.	No. CIV 81-295 PHX WPC CA-81-5297
JAMES P. DUNLAVEY, Receiver, Plaintiff, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	NOTICE OF APPEAL

Notice is hereby given that Richard Charlton, Debtor-Appellant above named, appeals to the United States Court of Appeals for the Ninth Circuit from the Memorandum and Order entered in this action on the 8th day of April, 1981.

Appendix F-2

DATED this 15th day of April, 1981.

LEWIS AND ROCA

By /S/Gerald K. Smith

John P. Frank
Gerald K. Smith
Neal L. Wolf
Attorneys for Debtor/Appellant
Richard Charlton
100 West Washington Street
Phoenix, Arizona 85003
(602) 262-5707

Copy of the foregoing
hand-delivered this 15th
day of April, 1981, to:

[Names and Addresses Deleted].

Appendix G — In the United States Bankruptcy Court in and for the District of Arizona.

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	NO. B 79 890 PHX VM B 79 890 L PHX VM ORDER

This matter having come on regularly for hearing before this court May 13, 1981 at 1:45 P.M. on special remand from the Ninth Circuit Court of Appeals to determine "whether the Alberding offer will provide for the prompt payment to all creditors except those who have agreed to a delay in payment, and if not, to what extent the offer does not provide for prompt payment." Notice of this hearing was previously filed and mailed by the Bankruptcy Clerk to all proper parties on April 28, 1981 following stipulation upon the hearing date by the Debtor and Cortez Development Corp.

Appearing at hearing *inter alia* were the debtor Richard Charlton, represented by his attorneys, Neal L. Wolf of Lewis and Roca, the receiver was represented in person; Cortez Development Corp., represented by C. Michael Pierce and Jerry L. Cochran of Burch & Cracchiolo, Creditors, Camelback Theaters by Ronald Warnicke and Anthony Lucia, of Treon, Warnicke and Roush, and Enterprise Leasing, by Piatt and Livoni.

The court finds the following:

1. At prior hearing on February 2, 1981 for bidding upon the sale of the debtor's property at North 7th Street, Cortez Development Corp. made a bid which was accepted by the court of $1,175,000. The terms of purchase, all set forth in this court's order of sale and exhibits thereto, provide *inter alia* that the debtor was to retain all fixtures and equipment. An appraisal on file with this court with the filing of the petition values these chattels at $114,000. The debtor was to retain salvage value of the buildings, if any.

2. At the February 2, 1981 hearing, Mr. Alberding bid $875,000 cash to purchase the real property and all fixtures and equipment and agreed to provide the debtor 49% of all redevelopment profits, if any. No commitment was offered by Mr. Alberding to perform any redevelopment. Mr. Alberding would accept the property subject to the Camelback Theater lease. Any costs of litigation, settlement and damages regarding the Camelback Theater Lease would be deducted from the debtor's share of the profits.

3. Mr. Alberding would not commit to a higher offer at the hearing, and his agents specifically refused to place his earnest money at risk for a higher offer on the date of the hearing. Mr. Alberding was represented at the hearing by Mr. Paul Gilbert of the law firm of Jennings, Strouss and Salmon.

4. Approximately four days after the hearing and the closing of the bidding, by the vehicle of a motion for reconsideration, Alberding, through the debtor, Charlton attempted to place a late bid before this court in the amount of $975,000 . . . cash, however this offer reduced the debtor's participation in the profits by some undetermined amount.

5. The court finds that the administrative expenses estimated for purposes of this remand hearing, but not allowed for any other purposes, are between $139,796.35 and $147,017.77, including the following amounts:

Lowell Jantzen (priority-wages)		$ 160.00
Ruben Ruvalcava (priority)		4,920.00
Internal Revenue Service		10,610.47
Interest $3.49 per day interest		1,300.00
Lewis and Roca		35,000.00
Jon Vogel		20,000.00
Real Estate Taxes		49,500.00
Appraisers		1,460.00
Receiver Fee —	Minimum	11,331.87
	Maximum	14,260.45
Referee Retirement and Expense Fund —	Minimum	5,414.01
	Maximum	9,806.82

These expenses are set forth in Schedule I attached hereto.

6. The court finds that the secured claims on the real property, plus interest to date are in excess of $749,303.39. The court finds that the secured claims secured by other property are $13,923.11. These claims are set forth in Schedule II attached hereto.

7. The court finds uncontested unsecured claims which have not agreed to a delay to be $133,434.08 as set forth in Schedule III attached hereto.

8. The court finds the contested unsecured claims that have not agreed to a delay to be $292,057.52 as set forth in Schedule IV attached hereto.

9. The court finds the unsecured claims that have agreed to a delay to be $127,500.00 as set forth in Schedule V attached hereto.

THEREFORE, IT IS ORDERED as follows:

1. The court in determining the ability of the Alberding offer to pay all debts except those who have agreed to a delay must consider the contested unsecured claims of $291,018.50, as if they are approved to insure that adequate funds are available to pay all claims. The court notes that no final adjudication of these claims has been obtained by the debtor although each such claim has been noticed by the filing of a notice of claim as required by law.[1]

2. The only Alberding offer properly before the court at the time noticed for hearing and bidding was to provide $875,000 cash, for the purchase of the debtor's real estate plus all improvements and equipment thereupon.

3. The Alberding offer would not pay the claims against the estate and would leave a deficit of $440,371.34, plus the debts of $127,500 as to which some creditors are willing to receive delayed payment.

4. The Alberding offer would not even pay the secured creditors, costs of administration, and uncontested unsecured claims who have not agreed to a delay, leaving an unpaid deficit on those claims alone of $147,513.82.

5. The late amended Alberding offer providing $975,000 cash filed with the motion for reconsideration four days after the close of the hearing for the bidding

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[1]The Schreiber claim set forth on Schedule IV has not filed a proof of claim. However, this claim must be disposed of prior to sale to Alberding because it involves a lease on the real property. Until the debtor notices the sale of the property to Alberding and declares the executory contract rejected in [the] claim is due.

was not filed timely and therefore, is not considered to be before the court.

6. The late, amended Alberding offer providing $975,000.00 cash, which this court did not consider because it was filed after the close of bidding, also does not provide adequate cash to make prompt payment of all claims and expenses of administration leaving a deficit of $340,371.34 plus debts of $127,500, as to which some creditors who are willing to receive delayed payment.

DONE IN OPEN COURT this 18th day of May, 1981.

/S/Vincent D. Maggiore
JUDGE
United States Bankruptcy Court

Appendix H — United States Bankruptcy Court
District of Arizona.

In Re RICHARD CHARLTON, Debtor/Appellant. JAMES P. DUNLAVEY, Receiver/Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al. Defendants.	No. B 79 890 PHX VM B 79 890 L PHX VM ORDER

This matter having come on regularly for hearing before this Court at 2:45 p.m. on May 28, 1981, on special remand from the Ninth Circuit Court of Appeals to determine the amount of the Supersedeas Bond and the time in which it must be posted. Appearing at the hearing through counsel were the debtor, Richard Charlton, represented by his attorney Neal L. Wolf of Lewis and Roca; Cortez Development Corp., represented by its attorney Jerry L. Cochran of Burch & Cracchiolo, P.A.; Camelback Theatres by Ronald Warnicke of Treon, Warnicke, Dann & Roush, P.A. Enterprise Leasing by William Piatt of Piatt & Livoni, P.C.; and First Arizona Mortgage and Investment Company by Timothy Barton of Jennings, Strouss & Salmon.

. . .

Upon stipulation of the parties, the Court finds as follows:

1. The amount of the Bond shall be set in the amount of one million dollars ($1,000,000.00).

2. The form of the Bond shall be as such agreed upon by the parties to provide sufficient surety as a Supersedeas Bond.

3. In the event the parties are unable to agree as to the form of the Bond, a hearing shall be held on June 8, 1981, at 9:00 a.m. before The Honorable Vincent D. Maggiore, Judge of the United States Bankruptcy Court, at which hearing the Court shall decide upon the proper form of the Bond.

4. The Bond, in approved form, shall be filed on or before June 10, 1981, at 5:00 p.m. The Stay Order issued by the Ninth Circuit Court of Appeals shall continue in full force and effect until that time. In the event the Bond is not posted in approved form by such time, the Stay issued by the Ninth Circuit Court of Appeals under the terms of the Order dated May 19, 1981, a copy of which is attached hereto, shall be lifted.

DONE IN OPEN COURT this _____ day of June, 1981.

_____

Judge of the United States
Bankruptcy Court

Appendix I — In the United States Bankruptcy Court for the District of Arizona.

In re RICHARD CHARLTON, Debtor.	B-79-890 PHX VM B-79-890 "L" PHX VM
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	ORDER DENYING MOTION

After having carefully considered the history of this case, the pleadings, hearings and the proposed "MOTION FOR ORDER SETTING SEPARATE BOND FOR CORTEZ DEVELOPMENT CORP.," promulgated by the attorneys for the debtor in this matter, therefore the Court now

ORDERS that said Motion shall be and is DENIED.

DATED: June 18, 1981

/S/Vincent D. Maggiore
JUDGE

Copy of the foregoing
mailed this 18th day
of June, 1981, to:

[Names and Addresses Deleted].

Appendix J — In the United States District Court for the District of Arizona.

In re:	No. B-79-890
RICHARD CHARLTON, Debtor.	No. Civ. 81-295 Phx. WPC
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	ORDER
RICHARD CHARLTON, Debtor.	

Pursuant to the order of the Ninth Circuit Court of Appeals,

IT IS ORDERED:

The judgment appealed from herein is vacated and the matter is remanded to the bankruptcy court for similar action.

DATED August 5, 1981.

/S/William P. Copple
United States District Judge

Appendix K — United States Court of Appeals
for the Ninth Circuit.

In re: RICHARD CHARLTON, Debtor.	
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, RICHARD CHARLTON, Debtor/Appellant.	No. 81-5297 DC# CV 81-295 C Arizona (Phoenix) ORDER

Before: TANG and FARRIS, Circuit Judges.

The court's order of July 31, 1981, is vacated.

Appellee's motion to dismiss this appeal as moot is granted, and the appeal is dismissed. *See In re Royal Properties, Inc.*, 621 F.2d 984 (9th Cir. 1980). The matter is remanded to the district court with direction to vacate the judgment appealed from, and to remand the matter to the bankruptcy court for appropriate action. Appellee's motion for substitution of parties is denied as moot.

Appendix L — United States Court of Appeals
for the Ninth Circuit.

In re: RICHARD CHARLTON, Debtor.	
JAMES P. DUNLAVEY, Receiver, Plaintiff-Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, RICHARD CHARLTON, Debtor-Appellant.	No. 81-5297 DC# CV-81-295 PHX C Arizona (Phoenix) ORDER

Before: TANG and FARRIS, Circuit Judges.

Appellees' motion for clarification of the court's order of August 5, 1981, is denied. Under the principles set forth by the Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the proper course of action for an appellate court to take when an appeal becomes moot is to vacate the judgment appealed from — thereby relegating the parties to the positions they then occupy, albeit without the compulsion of a binding decree. As applied in this case, this procedure requires that we leave the parties in the positions they would have occupied had no appeal been taken from the bankruptcy court's order approving the sale of the property at issue. The court having been deprived of the opportunity to rule on the merits of the appeal by its becoming moot, no other

disposition is warranted — nor is any other disposition required in order to protect appellees' interests.

Appellant's petition for reconsideration and alternative motion for clarification are denied.

Appendix M — United States Court of Appeals
for the Ninth Circuit.

In re: RICHARD CHARLTON, Debtor JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, RICHARD CHARLTON, Debtor/Appellant.	No. 81-5297 DC# CV 81-295 C Arizona (Phoenix) ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) to aid this court's consideration of appellant's motion for stay, the case is remanded to the district court with instructions to remand the matter to the bankruptcy court to permit the bankruptcy court to determine whether the Alberding offer will provide for prompt payment to all creditors except those who have agreed to a delay in payment, and if not, to what extent the offer does not provide for prompt payment;

(b) the remand from this court shall last for not more than twenty-one (21) days from the entry of this order; and

(c) the bankruptcy court's order of February 12, 1981 is stayed for twenty-one (21) days from the entry of

this order or until further order of this court. In order to secure the creditors and Cortez Development Corp. for any damages that might be caused because of this delay, the stay is conditioned upon appellant's filing in the district court, within four (4) days from the entry of this order, a bond in the amount of forty thousand dollars ($40,000).

Appendix N-1

Appendix N — United States Court of Appeals for the Ninth Circuit.

In re:	No. 81-5297
RICHARD CHARLTON, Debtor.	D.C. #CV81-295 C ARIZONA (PHOENIX)
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, RICHARD CHARLTON, Debtor/Appellant.	ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) The bankruptcy court's order of February 12, 1981 is stayed pending appeal. The stay is conditioned upon appellant's posting of a bond in an amount that is fully adequate to pay all creditors. The bankruptcy court shall determine the amount of the bond and the time within which it must be posted;

(b) The certificate of record, heretofore received, is ordered filed;

(c) The parties shall make arrangements with the clerk of the district court for the prompt supplementation of the record with any documents and transcripts relevant to the proceedings that took place in the bankruptcy court

pursuant to this court's orders of April 20, 1981 and May 1, 1981;

(d) The clerk shall calendar the appeal for argument in August 1981 or as soon thereafter as practicable;

(e) The parties shall comply with the following briefing schedule

(1) Appellant shall file his opening brief on or before June 5, 1981;

(2) Appellees shall file their responding brief on or before June 24, 1981;

(3) Appellant may file a reply brief on or before July 6, 1981; and

(4) No extensions of time will be granted except under extraordinary circumstances.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 11 1982
ALEXANDER L. STEVAS

NO. 81-997

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RICHARD CHARLTON, PETITIONER,

v.

CORTEZ DEVELOPMENT CORPORATION, an Arizona corporation; SEVENTH CAMEL ASSOCIATES, an Arizona joint venture; and JAMES P. DUNLAVEY, Chapter XI Receiver, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Counsel of Record for Respondents, Cortez Development Corp. and Seventh Camel Associates

January 6, 1982

TABLE OF CONTENTS

	PAGE
RESTATEMENT OF THE CASE AND STATEMENT OF FACTS	1
ARGUMENT	14
I. INTRODUCTION	14
II. THE PETITIONER DEBTOR WAS PROVIDED WITH FULL DUE PROCESS OF LAW	15
III. THE COURT PROPERLY ORDERED SALE OF THE PROPERTY TO CORTEZ DEVELOPMENT CORP. . . .	20
IV. CORTEZ DEVELOPMENT CORP. AND SEVENTH CAMEL ASSOCIATES SHOULD BE AWARDED ATTORNEYS' FEES AND DAMAGES FOR DELAY . . .	23

TABLE OF AUTHORITIES

	PAGE
Goldberg v. Weiner, 480 F.2d 1067, 1069 (9th Cir. 1973)	15
In re Dania Corporation, 400 F.2d 833 (5th Cir. 1968). . .	21
In re Pure Penn Petroleum Co.Inc., 188 F.2d 851 (2d Cir. 1951)	20
In re Rock Industries Machinery Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)	18
In re Wonderbowl, Inc., 515 F.2d 18, 19 (9th Cir. 1975)	21, 22
Miller v. Avirom, 384 F.2d 319 (D.C. Cir. 1967)	22
11 U.S.C. § 713 (1980)(Bankruptcy Act);	21
11 U.S.C. § 1121 (1980)	2
Rules of Bankruptcy Procedure, Rule 805	
Rules of Bankruptcy Procedure, Rule 810	22
Rules of Bankruptcy Procedure, Rule 11-54(b).	21

RESTATEMENT OF THE CASE

AND STATEMENT OF FACTS

Because of glaring omissions from the statement of the case, and omissions of material facts set forth in the record, the respondent finds it necessary to restate the statement of the case.

The debtor/petitioner[1] herein, Richard Charlton, filed an application for reorganization under Chapter XI of the Bankruptcy Act on or about May 7, 1979. The debtor had previously been in reorganization, In Re: Richard Charlton, in the United States Bankruptcy Court for the District of Arizona, No. B-79-144-PHX filed on August 31, 1977, and completed less than six months prior to filing of the petition which is the subject matter of this action.

After the filing of the petition on May 7, 1979, the record in the Bankruptcy Court

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[1] Petitioner, Richard Charlton, may be referred to herein as petitioner or debtor.

is replete with the dilatory tactics by the debtor, Richard Charlton, as he put off the court and the creditors for an unduly long length of time. The Bankruptcy Court expressed a number of times that it had bent over backwards in being patient with the debtor in allowing him to present a feasible plan. The court's order approving sale to Cortez Development Corporation (hereinafter Cortez), or its nominee, dated February 12, 1981, docket number L-21, attached in the Appendix herein, sets forth the chronology and delay in this matter.

During the first eight months of this action, no reorganization plan was formulated by the debtor.[2] Postponements were sought and obtained in filing the plan by the debtor on January 30, 1980 and April 7, 1980. The debtor's first proposed plan

[2] It is interesting to note under the new Bankruptcy Code 11 U.S.C. § 1121, the debtor has a period of only 120 days in which it has the exclusive right to file a plan of reorganization.

was filed on July 1, 1980. The plan was overwhelmingly voted down by the creditors and the debtor was adjudicated a bankrupt on September 11, 1980.

Upon motion to reconsider, the court granted an order on October 10, 1980, removing the adjudication, and giving the debtor an additional sixty days in which to file a plan and obtain approval of it.

During the entire course of this proceeding, interest due on the first mortgage and other secured creditors have been accumulating against the estate at approximately $11,000.00 per month while income from the property has averaged less than $1,200.00 per month. The estate has accumulated additional secured debt to the detriment of the unsecured creditors during this delay of approximately $250,000.00.

On November 24, 1980, a second amended plan of reorganization was filed by the debtor. This plan as proposed by the debtor

was woefully inadequate and had serious problems in providing payment for unsecured creditors. See order of Bankruptcy Court dated May 18, 1981, at Appendix herein.

Prior to filing the plan of reorganization in November, the debtor had received an offer from Cortez, the respondent herein, to purchase the property for One Million Dollars in cash. The debtor, in his letter to creditors seeking approval of the plan, failed to disclose the existence of this offer to any of the creditors. In the plan of reorganization, the debtor supported an offer by C. H. Alberding (hereinafter Alberding). Alberding is guaranteeing the fees of the debtor, Charlton, for all legal action taken herein. As the Court can tell from reviewing this record, the appeal herein is not the debtor asserting its rights as a debtor, but an attempt by Alberding, through the auspices of the debtor, to urge his sale over and above

the sale by the estate to Cortez and its nominee, Seventh Camel Associates.

Prior to confirmation of the plan, the receiver, through its attorney, who had obtained knowledge of the Cortez offer, filed a separate application to sell the same property to respondent, Cortez.

The Bankruptcy Court approved the sale to Cortez by order of February 12, 1981. (See Appendix B.) The order was appealed to the District Court for the District of Arizona. The Honorable William P. Copple, by order dated April 8, 1981, affirmed the order of the Bankruptcy Court.

Cortez, because of the requirements of Rule 805 of the Bankruptcy Rules, filed a motion in the Bankruptcy Court to determine its status as a good faith purchaser. The matter was originally scheduled for hearing on April 8, 1981, before the bankruptcy judge while the appeal was still being held in the district court. On that date, the

court entered an order continuing the hearing until April 16, 1981, allowing Cortez five working days from the date of an order of good faith purchaser status, to complete the sale, if the order confirming the sale to Cortez was to be affirmed by the Honorable William P. Copple. The evidentiary hearing was held on April 13, 1981, at 2 p.m. by consent, after the affirmance by Judge Copple. Therein, the court determined that Cortez was a good faith purchaser pursuant to Rule 805 of the Bankrupty Rules.

Upon the affirmance of the appeal by the district court, the debtor, Richard Charlton, immediately filed an emergency motion with the Ninth Circuit for a stay pending appeal. After hearing on this matter, the Ninth Circuit issued a temporary order granting the stay for them to further consider the Motion for Stay. After hearing on April 20, 1981, the Ninth

Circuit issued an order granting a temporary stay to remand this matter to the Bankruptcy Court to provide the Ninth Circuit with an analysis of the Alberding offer supported by the debtor. The remand order was to be accomplished within twenty-one days, and a bond was to be posted to secure the creditors and Cortez in the amount of $40,000.00 for any damages during the delay.

After a short continuance was granted, because of scheduling problems, the Bankruptcy Court entered an order on or about May 18, 1981, setting forth an analysis of the Alberding offer showing that it was seriously deficient in providing for payments of unsecured claims of this estate. (See Appendix.)

Upon receipt of these materials, the Ninth Circuit, on or about May 19, 1981, entered an order staying the Bankruptcy Court's order of February 12, 1981. The

stay was specifically conditioned upon the debtor posting a bond that is fully adequate to pay all creditors, and ordered that the Bankruptcy Court shall determine the amount of the bond and the time within which it must be posted. (A copy of this order is in the Appendix).

Upon remand, at hearing on May 28, 1981, the debtor, Richard Charlton, through his counsel, stipulated that the amount of the bond would be set at One Million Dollars, and that the bond would be filed in approved form on or before June 10, 1981. The stipulated order also provided that if the parties were unable to agree as to the form of the bond, a hearing was to be held on June 8, 1981, before the Honorable Vincent Maggiore to agree to the form of the bond. Debtor in his petition implies that this was a unilateral action by the Bankruptcy Court in giving the debtor a short time in which to post the bond.

This is entirely incorrect. The date was set by stipulation and agreement with the debtor's counsel. The debtor also circuitously implies that at all times he considered the bond to be only to secure the creditors of the estate. This is also entirely incorrect. During the negotiations from May 28th through June 8th, at all times discussions were had regarding posting a bond that would secure not only the debtors, but Cortez.

At the eleventh hour, the debtor and Alberding attempted to avoid any potential liability to Cortez by removing them from the bond. The Bankruptcy Court entered an order on June 11, 1981, which clearly indicated that the debtor must post a cash bond, or a bond in the same form as the previous bond approved by the Honorable William P. Copple, and that the bond shall be for the protection of the creditors of the estate of Richard Charlton and Cortez.

In order to change the form of the bond from a letter of credit to a cash bond, or a proper insurance bond, the court extended the period of time for the debtor to post the bond to June 12, 1981.

The debtor immediately filed an emergency motion with the Ninth Circuit Court of Appeals appealing this order for determination that a letter of credit would be adequate, and that the bond should not run in favor of Cortez. The debtor thereafter, by telephone, notified the Ninth Circuit Court of Appeals that it was withdrawing its objection to the portion of the order requiring a cash bond or an insurance bond as it was prepared to file a cash bond. On June 12, 1981, the Ninth Circuit Court of Appeals, contrary to the assertion in the petition for writ of certiorari that the Circuit declined to intervene, entered the following order:

> Upon due consideration of appellant's emergency motion for order determining compliance with this court's order of May 19, 1981, the court issues the following order:
>
> (a) Having been informed by counsel for appellant that the one million cash bond will be posted, the court finds the question of sufficiency of a letter of credit is moot, and
>
> (b) The bond required by the court's order of May 19, 1981 is intended to run to the benefit of Cortez Development Corp. as well as to the creditors.

Thereafter, contrary to the assertion in the petition for writ of certiorari, that the Bankruptcy Court rejected the bond filed by the debtor, the debtor voluntarily withdrew the bond from the court. Therefore, the stay expired automatically. Rather than leave the amount of the stipulated bond, as required by the Ninth Circuit for the benefit of the creditors and Cortez, the debtor consciously chose to withdraw its bond and take its chances. It chose instead to file a motion with the

Bankruptcy Court to have a separate bond posted in favor of Cortez. This motion was denied by order of June 18, 1981.

This action by the debtor left Cortez on the horns of a dilemma. The stay for the order approving sale had expired. Therefore, by the terms of that order, Cortez must comply with its contract or be in breach of the contract. Therefore, on or about June 17, 1981, Cortez, through its nominee, Seventh Camel Associates, fully and completely complied with the terms of the contract, by paying the complete cash price of One Million One Hundred Seventy-Five Thousand Dollars to the trustee. The trustee conveyed to him a deed of the property free and clear of all liens.

On June 23, 1981, Cortez filed a motion to dismiss the appeal as moot because the sale had closed. The debtor responded on July 2, 1981, raising the argument that the

appeal should not be moot until a fact determination is made as to whether or not Seventh Camel Associates was a good faith purchaser under Rule 805 of the Bankruptcy Rules. The sole grounds for the argument was that Cortez had sent a letter to Alberding setting forth the damages that Cortez would seek once the appeal was dismissed. Therefore, they argue that Alberding refused to cover Cortez by the bond.

The reply to the response was filed on July 13, 1981. As clearly set forth therein, Cortez and Seventh Camel Associates are one and the same. Cortez was utilized by the principals as the vehicle to purchase the property. The same at all times was set forth as "Cortez Development Corporation and/or nominee." Throughout these proceedings, the same five principals have been responsible for the purchase of the property--Howard Pynn,

Albert Swink, Albert Wareing, Cyrus Kalantari and Gerald Dixon.

On August 3, 1981, the Ninth Circuit obviously finding no bad faith, as set forth in Rule 805, dismissed the appeal as moot. On August 18, 1981, Cortez moved under Rule 38 for damages for delay on appeal. Debtor filed a timely motion for rehearing which was denied by the Ninth Circuit on August 28, 1981. The Ninth Circuit on September 18, 1981, granted the motion by Cortez for damages for delay to be determined by the Bankrupty Court.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

I. INTRODUCTION

The petitioner raises two issues to support his petition for writ of certiorari: (1) that due process and the bankruptcy statutes require that the debtor have a hearing on the issue of "good faith"

regarding the same of his property, and (2) the Bankruptcy Court could not order a sale other than pursuant to a debtor-inspired plan. Neither of these issues were raised to any of the courts below. Therefore, they cannot be raised for the first time. Goldberg v. Weiner, 480 F.2d 1067, 1069 (9th Cir. 1973). For this reason alone the petition should be denied.

II. THE PETITIONER DEBTOR WAS PROVIDED WITH FULL DUE PROCESS OF LAW

As the record amply points out, the debtor/petitioner, Richard Charlton, was accorded full due process in this matter. The Ninth Circuit completely and fully considered all matters herein and determined that the appeal was moot impliedly finding that Cortez and its nominee, Seventh Camel Associates, was a good faith purchaser under Rule 805 of the Bankruptcy Rules. Due process does not require an evidentiary hearing when the facts are not in dispute.

The plea made by the debtor herein is no more than a blatant attempt by a debtor on behalf of an unsuccessful purchaser to further delay this matter and cause additional hardship to five individuals who came before the Bankruptcy Court and bid the highest and best price for the property. As set forth in the motions before the Ninth Circuit, the uncontested facts are as follows:

In October, 1980, Howard Pynn, Cyrus Kalantari, Albert Wareing, Gerald Dixon and Albert Swink attempted in good faith under the auspices of Cortez to purchase real property from the Charlton estate in Chapter XI bankruptcy. Upon a sale, properly noticed, the Court ordered the sale to Cortez and/or nominee. The debtor appealed the matter to the district court. The sale was affirmed by the district court thereafter, at a factual hearing the Bankruptcy Court found that Cortez was a

good faith purchaser under Rule 805. No evidence was produced at that hearing to show collusive bidding or fraud.

The debtor then appealed the sale matter to the Ninth Circuit Court of Appeals. The Ninth Circuit ordered a bond to be posted for the creditors of the estate and Cortez in an amount to be set by the Bankruptcy Court. The debtor stipulated to the amount and the date it was to be filed. After posting the bond, the debtor withdrew the bond because it must also be in favor of Cortez. After the bond was withdrawn, the sale closed in the name of Seventh Camel Associates, an Arizona joint venture, the same principals that had backed the sale at all times. The closing was no more than a mere change of name.

Prior to the posting of the bond, Cortez advised Mr. C. H. Alberding of the damages it expected to incur because of

delay during appeal and that if the appeal was unsuccessful, which it must be, Cortez would seek to prove and establish those damages.

That letter is the sole basis that debtor argues shows bad faith. No factual hearing was necessary. The Ninth Circuit properly ruled by granting the motion to dismiss that no evidence of bad faith as required by Rule 805 existed. The test for such status is set forth in In re Rock Industries Machinery Corp., 572 F.2d 1195, 1198 (7th Cir. 1978). The rule clearly implies some conduct must exist to establish bad faith that would lower the ultimate purchase price that would have otherwise been paid to the estate--such as fraud, collusion between bidders or the trustee, or an attempt to take unfair advantage of other bidders. The Ninth Circuit properly rejected the debtor's argument. No factual hearing or discovery

was needed because the debtor's allegations would fail to prove a bad faith status as required by the rule.

The rule otherwise would jeopardize the system set up by Congress to insure that sales of property can move forward quickly and judiciously, but without unnecessary delay. The purpose of the rule is to allow purchaser to plan and utilize the property. Such a procedure helps to insure that each bidder will be prepared to offer his best price at the noticed sale.

The full hearing regarding the "good faith" status that the debtor proposes would destroy the purpose and intent of Rule 805 by making it impossible for any sale that was appealed from to close. If evidence of true bad faith were to exist, the mechanism was and is available for the debtor to proceed. It could have immediately noticed depositions or asked for a hearing by order to show cause. It chose

to do neither. Debtor should not be awarded for his dilatory conduct by further delay.

III. THE COURT PROPERLY ORDERED SALE OF THE PROPERTY TO CORTEZ DEVELOPMENT CORPORATION

Debtor's argument that the Court could not order a sale outside a debtor's plan of arrangement is absurd. First, it is raised for the first time in this petition. In all the courts below, the debtor attempted to argue that the Court could not sell the property relying exclusively upon In re Pure Penn Petroleum Co., Inc., 188 F.2d 851 (2d Cir. 1951). In this argument debtor was "hoisted on his own petard" because such a ruling would, as the Honorable William P. Copple of the United States District Court for the District of Arizona aptly pointed out, also prohibit the sale proposed by the debtor. Clearly, the Court has the power to order a sale even in

Chapter XI proceedings under the old Act. 11 U.S.C. § 713 (1980) (Bankruptcy Act); Rule 11-54(b); In re Dania Corporation, 400 F.2d 833 (5th Cir. 1968); In re Wonderbowl, Inc., 515 F.2d 18, 19 (9th Cir. 1975).

Realizing now perhaps for the first time the futility of such argument, the debtor asserts to this Court that the Bankruptcy Court can only approve the sale set forth in his plan of arrangement arguing that only the debtor can submit a plan. This argument is fallacious for two reasons. First, it ignores the power of the Court to order and approve a sale even in a Chapter XI proceeding outside of the debtor's plan. See authorities cited in the proceeding paragraph. Secondly, it too narrowly defines the debtor's plan of arrangement. Debtor would have the Court believe his plan encompassed the sale to Alberding. This is not so. His plan

encompassed a sale of the property. The sale of the property to Alberding was the offer that he supported. It is and would have been incumbent upon the Bankruptcy Court to require open bidding to obtain the highest and best bidder to provide maximum payout to the unsecured creditors. The Court properly followed this duty and factually determined that Cortez was the highest bidder. Such a finding must be affirmed unless findings of the Bankruptcy Court are clearly erroneous. Rule 810 of the Rules of Bankruptcy Procedu , Miller v. Avirom, 384 F.2d 319 (D.C. Cir. 1967). The order of sale was not an abuse of discretion. In re Wonderbowl, supra, 515 F.2d at 20.

For the foregoing reasons, the petitioner's arguments must be rejected.

IV. CORTEZ DEVELOPMENT CORPORATION AND SEVENTH CAMEL ASSOCIATES SHOULD BE AWARDED ATTORNEYS' FEES AND DAMAGES FOR DELAY

The respondents respectfully request that this Court enter an order granting it attorneys' fees and damages for delay incurred by it for responding to this clearly frivolous petition for writ of certiorari that was filed solely for delay purposes with no legitimate chance that certiorari would be granted. Such a ruling could aid the judicial process by sounding warning to the bar that this Court will no longer tolerate the filing of a petition for writ of certiorari without sound legal basis so that this Court may be free to

devote its efforts to matters of national legal importance.

RESPECTFULLY SUBMITTED this 7th day of January, 1982.

BURCH & CRACCHIOLO, P.A.

By _____

Daniel F. Cracchiolo
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Counsel of Record for
Respondents, Cortez
Development Corporation and
Seventh Camel Associates

January 6, 1982

INDEX TO APPENDIX

	PAGE
United States Bankruptcy Court Order dated April, 1981	0,A-0
United States Bankruptcy Court Order dated April, 1981	A-1,2
United States Bankruptcy Court Order dated June, 1981	A-3,4
United States Bankruptcy Court Order dated June, 1981.	A-5-7
United States District Court Bond	A-8-11
United States Court of Appeals Emergency Motion for Order Determining Compliance with the May 19, 1981 Order of the United States Court of Appeals for the Ninth Circuit and Memorandum in support thereof	A-12-19
United States Court of Appeals Order dated June 12, 1981	A-20
United States Bankruptcy Court Order Denying Motion dated June 18, 1981	A-21,22
United States Bankruptcy Court Order dated June, 1981.	A-23-29
United States Court of Appeals Motion to Dismiss Debtor's Appeal dated June 23, 1981. . . .	A-30-40

PAGE

United States Court of Appeals Response to Motion to Dismiss Debtor's Appeal dated July 2, 1981. . . . . A-41-106

United States Court of Appeals Order dated September 18, 1981 . . . . . A-107

United States Court of Appeals Response to Motion to Reserve Consideration of Motion to Dismiss Debtor's Appeal dated July 10, 1981 . . . . . A-108-110

United States Court of Appeals Response of Debtor Richard Charlton to Motion for Clarification, as supplemented, of Cortez dated August 14, 1981. . . . . A-111,112

United States Court of Appeals Motion for Appellee Cortez Development Corp. for Damages for Delay dated August 18, 1981 . . . . . A-113-121

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Attorneys for Cortez Development Corp.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST, an Arizona corporation, et al., Defendants.	No. B-79-890 PHX VM B-79-890-L PHX VM ORDER

The motion of Cortez Development Corp. to determine its status as good faith purchaser, pursuant to Rule 805 of the Federal Rules of Bankruptcy, came on regularly for hearing on Wednesday, April 8, 1981. Present and represented at the hearing were Richard Charlton and his attorney, Neal Wolf of Lewis and Roca, and Cortez Development Corp. through its attorney, Jerry L. Cochran of Burch & Cracchiolo, P. A. No other appearances were noted. The Court notes that proper notice of the hearing has been given. The Court further notes the written objections of the debtor to the determination of the good faith purchase status of Cortez Development Corp.

The Court therefore orders as follows:

1. The evidentiary hearing to determine the good faith purchaser status of Cortez Development Corp. shall be held on Thursday, April 16, 1981 before this Court at 9:30 a.m.

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2. That the debtor, Charlton, shall have the burden of proof to establish bad faith of Cortez Development Corp.

3. That if the order of this Court confirming the sale to Cortez Development Corp. is affirmed by the Honorable William P. Copple on appeal, Cortez Development Corp. shall have five (5) working days from the date of the order of this Court determining their status as a good faith purchaser in which to comply with the terms and conditions of the contract confirmed by order of this Court on February 12, 1981.

DONE IN OPEN COURT this ____ day of April, 1981.

Judge, Bankruptcy Court, for the District of Arizona

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TELEPHONE (602) 252-7701

Attorneys for Cortez Development Corp.

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	No. B-79-890 PHX VM B-79-890-L PHX VM ORDER

The evidentiary hearing regarding the motion of Cortez Development Corp. to determine its status as good faith purchaser, pursuant to Rule 805 of the Federal Rules of Bankruptcy, came on regularly for hearing on Monday, April 13, 1981 at 2 p.m. Present and represented at the hearing were Richard Charlton and his attorney, Neal L. Wolf of Lewis and Roca, and Cortez Development Corp. through its attorney, Jerry L. Cochran, of Burch & Cracchiolo, P. A.

The matter is presented to the Court for ruling upon stipulated evidence as set forth in the record of proceedings.

The Court having considered the evidence, and the briefs of the parties, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Cortez Development Corp. is a good faith purchaser pursuant to Rule 805 of the Federal Rules of Bankruptcy

in regard to the purchase of the property of the debtor in this estate as set forth in the Order Confirming Sale signed by this Court on or about February 12, 1981.

2. That Cortez Development Corp. shall have five (5) working days from the date of this Order in which to comply with the terms and conditions of the contract confirmed by Order of this Court on February 12, 1981.

DONE IN OPEN COURT this ____ day of April, 1981.

Judge of the Bankruptcy Court
for the District of Arizona

BURCH & CRACCHIOLO, P.A.
2333 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004
TELEPHONE (602) 252-7701

Attorneys for Cortez Development Corp.

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al. Defendants.	NO. B 79 890 PHX VM B 79 890 L PHX VM O R D E R

This matter having come on regularly for hearing before this Court at 2:45 p.m. on May 28, 1981, on special remand from the Ninth Circuit Court of Appeals to determine the amount of the Supersedeas Bond and the time in which it must be posted. Appearing at the hearing through counsel were the debtor, Richard Charlton, represented by his attorney Neal Wolf of Lewis and Roca; Cortez Development Corp., represented by his attorney Jerry L. Cochran of Burch & Cracchiolo, P.A.; Camelback Theatres by Ronald Warnicke of Treon, Warnicke, Dann & Roush, P.A.; Enterprise Leasing by William Piatt of Piatt & Livoni, P.C.; and First Arizona Mortgage and Investment Company by Timothy Barton of Jennings, Strouss & Salmon.

:::

:::

Upon stipulation of the parties, the Court finds as follows:

1. The amount of the Bond shall be set in the amount of one million dollars ($1,000,000.00).

2. The form of the Bond shall be as such agreed upon by the parties to provide sufficient surety as a Supersedeas Bond.

3. In the event the parties are unable to agree as to the form of the Bond, a hearing shall be held on June 8, 1981, at 9:00 a.m. before The Honorable Vincent Maggiore, Judge of the United States Bankruptcy Court.

4. The Bond, in approved form, shall be filed on or before June 10, 1981, at 5:00 p.m. In the event the Bond is not posted in approved form by such time, the Stay issued by the Ninth Circuit Court of Appeals under the terms of the Order dated May 19, 1981, a copy of which is attached hereto, shall be lifted.

DONE IN OPEN COURT this ____ day of _____, 1981.

_____
Judge of the United States
Bankruptcy Court

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Attorneys for Cortez Development Corp.

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	No. B 79 890 PHX VM ORDER

This matter having come on regularly for hearing before this Court on June 11, 1981, at 9:30 a.m. upon special request by Neal Wolf, attorney for the debtor, for determination of approving the form of supersedeas bond as a letter of credit. Telephonic notice of this hearing was given to interested parties. Appearing at the hearing inter alia were the debtor, Richard Charlton, represented by his attorneys, Neal L. Wolf and Gerald K. Smith of Lewis and Roca; Mr. Alberding, the unsuccessful bidder in this matter, represented by his attorney, Gary Keltner of Jennings, Strouss & Salmon; Valley National Bank of Arizona, the issuer of the proposed letter of credit, represented by its attorney, Robert Burns; Cortez Development Corp. represented by Jerry L. Cochran; the receiver James P. Dunlavey, represented by his attorney, Jon Vogel; Camelback Theaters, Inc., represented by Geri Kurtz, of Treon, Warnicke & Roush; Enterprise Leasing,

represented by William Piatt; and First Arizona Mortgage and Investment Company, represented by its attorney, Timothy Barton of Jennings, Strouss & Salmon.

The Court, after hearing arguments of counsel, and considering the written memorandum of law and objection to form of bond and materials attached thereto filed by Cortez Development Corp., finds as follows:

1. The order of this Court setting the amount of bond and the requirement that the bond be filed by June 10, 1981, was entered upon stipulation of the parties.

2. At the request of counsel for the debtor, Neal Wolf, this Court scheduled time at 9 a.m., June 8, 1981 to consider objections to the form of the bond.

3. At that hearing, the Court was advised by Neal Wolf, counsel for the debtor, that no form of bond had yet been submitted to the other parties, as none had yet been obtained.

4. The proposed letter of credit is inadequate as a form of a surety bond.

5. That Cortez Development Corp. is the real party in interest in this matter, and is deserving of the protection of a bond filed for a stay in the amount set by this Court by stipulation of the parties of One Million Dollars.

6. While the Court recognizes that a surety bond was preferable, it may have led counsel for the debtor to explore the use of a letter of credit. Therefore, the Court will consider extending additional time for the debtor to obtain a bond.

Based upon the foregoing,

IT IS ORDERED AS FOLLOWS:

1. The debtor must post a bond in the amount of One Million Dollars, either in cash, or a bona fide surety company in the same form and condition as the bond approved by the Honorable William P. Copple, in the form attached hereto as

Exhibit A.

2. The bond shall be in the amount of One Million Dollars.

3. The bond shall be for the protection of creditors of the estate of Richard Charlton and Cortez Development Corp.

4. The bond must be filed by 5 p.m., June 12, 1981. In the event the bond is not posted in approved form by such time, the stay issued by the Ninth Circuit Court of Appeals under the terms of the order dated May 19, 1981, shall be lifted, and of no further force and effect.

DONE IN OPEN COURT this ___ day of June, 1981.

Judge, U. S. Bankruptcy Court

COPY of the foregoing delivered/
mailed this 11 day of June, 1981, to:

Gerald K. Smith
LEWIS AND ROCA
100 West Washington
Phoenix, Arizona 85003

Jon N. Vogel
7119 First Avenue
Suite 106
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By _____

COPY
ORIGINAL FILED
ON THIS DATE
APR 24 1981
W. J. Furstenau, Clerk
United States District Court
For the District of Arizona

No. U 30 87 09

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In Re RICHARD CHARLTON, Debtor.	No. CIV 81-295 PHX WPC
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	BOND

KNOW ALL MEN BY THESE PRESENTS:

The we, RICHARD CHARLTON, as Principal and UNITED PACIFIC INSURANCE COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of [illegible]ington and duly authorized to transact business in the State of Arizona, as Surety, are held and firmly bound unto THE CREDITORS OF THE ESTATE OF RICHARD CHARLTON, Debtor in proceedings under Chapter XI of the Bankruptcy Act presently pending in the Bankruptcy Court of the District of Arizona and entitled No. B-79-890 PHX-VM and CORTEZ DEVELOPMENT CORPORATION, an Arizona corporation, in the full sum of FORTY THOUSAND DOLLARS ($40,000) in lawful money of the United States of America to be

paid to the said CREDITORS and/or CORTEZ DEVELOPMENT CORPORATION, their heirs, executors, administrators, successors and assigns for the payment of which well and truly to be made, the said Principal and Surety hereby bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, on the 8th day of April, 1981, the United States District Court for the District of Arizona, Judge William P. Copple presiding, entered a judgment affirming a February 12, 1981 order of the Bankruptcy Court for the District of Arizona approving a sale of certain real property.

WHEREAS, the Debtor has appealed to the United States Court of Appeals for the Ninth Circuit from the above mentioned judgment and the whole thereof, and

WHEREAS, on April 21, 1981 the United States Court of Appeals for the Ninth Circuit entered an order staying the consummation of the above-described sale for a period of 21 days from the date of entry of the stay order and conditioning the entry of the stay order on the filing with the District Court within 4 days of the date of entry of that order of a bond in the amount of $40,000 in order to protect the creditors of the Estate and Appellee Cortez Development Corporation from any damage that might be caused them as a result of the stay if the appeal is ultimately unsuccessful.

NOW THEREFORE, if for any reason the appeal is dismissed or if the April 8, 1981 judgment of the District Court is affirmed, any damages that may be suffered by the creditors of the Estate of Richard Charlton and Cortez Development Corporation as a result of the stay order entered by the Court of Appeals shall be satisfied in such amount however as shall not exceed the amount of this bond, but if the Debtor shall prosecute his appeal

with effect, this bond shall be of no force and effect.

IN WITNESS WHEREOF, the said Principal has signed these presents and the Surety has likewise signed and executed these presents this 24th day of April, 1981.

RICHARD CHARLTON, as Principal

UNITED PACIFIC INSURANCE COMPANY, a Washington corporation, as Surety

By _____
Its Attorney-in-Fact

APPROVED this 24
day of April, 1981

Honorable William P. Copple
Judge, United States
District Court

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That the UNITED PACIFIC INSURANCE COMPANY, a corporation duly organized under the laws of the State of Washington, does hereby make, constitute and appoint

GEORGE F. DICKINSON of PHOENIX, ARIZONA--------

its true and lawful Attorney-in-fact, to make execute, seal and deliver for and on its behalf, and as its act and deed

ANY AND ALL BONDS AND UNDERTAKINGS OF SURETYSHIP-----

and to bind the UNITED PACIFIC INSURANCE COMPANY thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive Officer of the UNITED PACIFIC INSURANCE COMPANY and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorney(s)-in-fact may do in pursuance hereof.

This Power of Attorney is granted under and by authority of Section 37A of the By-Laws of UNITED PACIFIC INSURANCE COMPANY which provisions are now in full force and effect, reading as follows:

SECTION 37A – ATTORNEYS IN FACT

SECTION 1. The Board of Directors, the President, or any Vice-President or Assistant Vice-President shall have power and authority to: (a) appoint Attorneys-in-fact and to authorize them to execute on behalf of the Company, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and (b) to remove any such Attorney-in-fact at any time and revoke the power and authority given to him.

SECTION 2. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof. The corporate seal is not necessary for the validity of any bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof.

This power of attorney is signed and sealed by facsimile under and by authority of the following Resolution adopted by the Board of Directors of UNITED PACIFIC INSURANCE COMPANY at a meeting held on the 26th day of October, 1971, at which a quorum was present, and said Resolution has not been amended or repealed:

> "Resolved, that the signatures of such directors and officers and the seal of the Company may be affixed to any such power of attorney or any certificate relating thereto by facsimile, and any such power of attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by facsimile signatures and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or undertaking to which it is attached."

IN WITNESS WHEREOF, the UNITED PACIFIC INSURANCE COMPANY has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, this 23rd day of July 19 79

UNITED PACIFIC INSURANCE COMPANY

Wm. J. Cotter
Vice-President

STATE OF Washington
COUNTY OF Pierce } ss.

On this 23rd day of July, 19 79 personally appeared WM. J. COTTER

_____, to me known to be the Vice-President of the UNITED PACIFIC INSURANCE COMPANY, and acknowledged that he executed and attested the foregoing instrument and affixed the seal of said corporation thereto, and that Section 37A, Section 1 and 2 of the By-Laws of said Company and the Resolution, set forth therein, are still in full force.

Nancy Starnes

My Commission Expires:

June 12, 19 82

Notary Public in and for State of Washington

Residing at Tacoma

I, Gerald C. Lyon, Assistant Secretary of the UNITED PACIFIC INSURANCE COMPANY, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney executed by said UNITED PACIFIC INSURANCE COMPANY, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Company, this 24th day of July 1981

Gerald C. Lyon
Assistant Secretary

SDU-9439 ED:2-72

Best Copy Available

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: RICHARD CHARLTON, Debtor.	
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, RICHARD CHARLTON, Debtor/Appellant.	No. 81-5297 D.C. #CV81-295 C ARIZONA (PHOENIX) EMERGENCY MOTION FOR ORDER DETERMINING COMPLIANCE WITH THE MAY 19, 1981 ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Debtor moves this Court for an Order determining that the Debtor has complied with subsection (a) of this Court's May 19, 1981 Order in the above captioned matter. This Motion is supported by the attached Memorandum and Exhibits. This is an emergency matter because the stay pending appeal granted by this Court on May 19, 1981 will expire if an appropriate Bond is not filed with the Bankruptcy Court for the District of Arizona by 5:00 p.m. Friday, June 12, 1981. Through this Emergency Motion, the Debtor seeks to resolve a misunderstanding which has arisen concerning in whose favor the Bond is required to run under subsection (a) of this Court's May 19, 1981 Order. All requirements of Rule 8 of the Rules of Appellate Procedure are met, and this Court has jurisdiction under the All Writs statute.

LAWYERS
FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

RECEIVED
JUN 1 1 1981

RESPECTFULLY SUBMITTED this 11th day of June, 1981.

LEWIS AND ROCA

By _____
John P. Frank
Gerald K. Smith
Neal L. Wolf
Attorneys for Debtor/Appellant

LAWYERS
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: RICHARD CHARLTON, Debtor.	
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, RICHARD CHARLTON, Debtor/Appellant.	No. 81-5297 D.C. #CV81-295 C ARIZONA (PHOENIX) MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR ORDER DETERMINING COMPLIANCE WITH THE MAY 19, 1981 ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On April 8, 1981, the United States District Court for the District of Arizona, Judge William P. Copple presiding, entered a Judgment affirming a February 12, 1981 Order of the Bankruptcy Court for the District of Arizona approving a sale of certain real property. Debtor Richard Charlton's timely appeal from that Judgment is presently under submission to this Court. On May 19, 1981, this Court entered an Order staying the consummation of the above-described sale indefinitely. That Order, which is attached as Exhibit A, provided in relevant part:

> "(a)The bankruptcy court's order of February 12, 1981 is stayed pending appeal. The stay is conditioned upon appellant's posting of a bond in an amount that is fully adequate to pay all

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PHOENIX, ARIZONA 85003
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creditors. The bankruptcy court shall determine the amount of the bond and the time within which it must be posted;". (Emphasis added.)

Pursuant to this Order, Bankruptcy Judge Vincent Maggiore subsequently entered an Order setting the Bond at $1,000,000.00. Judge Maggiore also extended the deadline before which the Bond must be filed until 5:00 p.m., Friday, June 12, 1981. Consequently, the Debtor has caused to be issued a Letter of Credit, attached hereto as Exhibit B and incorporated herein by reference, for the full amount, which will be filed by Stipulation in lieu of a supercedeas Bond to secure the creditors.

Misunderstanding arose on Thursday morning, June 11, 1981 when Bankruptcy Judge Maggiore issued an oral Order which declared that the Debtor's Bond must run not only to the benefit of all creditors but also to the benefit of Cortez Development Co., the buyer of the property under the order involved in the appeal. Judge Maggiore also refused to allow the letter of credit, which was used to save the large bond premium. The Debtor maintains that Judge Maggiore's Order imposes an unnecessary expense and burden upon the Debtor which is inconsistent with this Court's May 19, 1981 Order. The Letter of Credit which the Debtor proposes to file protects all parties who deserve protection under this Court's May 19 Order. Cortez Development Co. is not a creditor but rather a mere purchaser with no vested right until the appeal is resolved.

LAWYERS
FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

Faced with an almost immediate deadline and Judge Maggiore's conflicting pronouncement, the Debtor ugently seeks this Court's determination that the Bond to be filed fully complied with subsection (a) of the May 19, 1981 Order, and is sufficient to continue the stay in full force and effect pending the Debtor's appeal.

RESPECTFULLY SUBMITTED this 11th day of June, 1981.

LEWIS AND ROCA

By _____
John P. Frank
Gerald K. Smith
Neal L. Wolf
Attorneys for Debtor/Appellant

LAWYERS
FIRST NATIONAL BANK PLAZA
ONE DUNCAN WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262 5311

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

GEOFFREY H. WALKER, being first duly sworn, says:

1. That I am an associate with Lewis and Roca, counsel for Debtor/Appellant Richard Charlton.

2. On Thursday, June 11, 1981, at approximately 3:10 P.M., I personally telephoned Jerry Cochran, counsel for Cortez Development Co. and informed Mr. Cochran of my plans to file an Emergency Motion for Order Determining Compliance with the May 19, 1981 Order of the United States Court of Appeals for the Ninth Circuit. Discussed were the general nature of the Emergency Motion itself and the nature and timing of Mr. Cochran's Response to the Motion.

3. It is imperative that this Emergency Motion for Order Determining Compliance be considered and promptly granted, since the deadline before which an appropriate bond must be filed is 5:00 P.M. Friday, June 12, 1981. The Debtor must meet this deadline in order to prevent the expiration of the stay pending appeal issued by this Court on May 19, 1981. That stay must remain in effect if the Debtor's appeal is not to be rendered moot.

Geoffrey H. Walker
GEOFFREY H. WALKER

SUBSCRIBED AND SWORN TO before me this 11th day of June, 1981.

My Commission Expires:

Notary Public

My Commission Expires July 13, 1982

FIRST NATIONAL BANK PLAZA
ONE NORTH WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 19 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

In re: RICHARD CHARLTON,
Debtor.

No. 81-5297

JAMES P. DUNLAVEY, Receiver,
Plaintiff/Appellee,
vs.
ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al.,
Defendants,
RICHARD CHARLTON,
Debtor/Appellant.

D.C. #CV81-295 C
ARIZONA (PHOENIX)

ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) The bankruptcy court's order of February 12, 1981 is stayed pending appeal. The stay is conditioned upon appellant's posting of a bond in an amount that is fully adequate to pay all creditors. The bankruptcy court shall determine the amount of the bond and the time within which it must be posted;

(b) The certificate of record, heretofore received, is ordered filed;

(c) The parties shall make arrangements with the clerk of the district court for the prompt supplementation of the record with any documents and transcripts relevant to the proceedings that took place in the bankruptcy court pursuant to this court's orders of April 20, 1981 and May 1, 1981;

(d) The clerk shall calendar the appeal for argument in August 1981 or as soon thereafter as practicable;

(e) The parties shall comply with the following briefing schedule:

(1) Appellant shall file his opening brief on or before June 5, 1981;

(2) Appellees shall file their responding brief on or before June 24, 1981;

(3) Appellant may file a reply brief on or before July 6, 1981; and

(4) No extensions of time will be granted except under extraordinary circumstances.

EXHIBIT A

Valley National Bank of Arizona

INTERNATIONAL DEPARTMENT – HOME OFFICE
PHOENIX, ARIZONA

James P. Dunlevey
Receiver of the
Estate of Richard Charlton
United States Bankruptcy Court
District of Arizona
No. B 79-890-PHX-VK

IRREVOCABLE LETTER OF CREDIT NO. SLC 1691

DATE June 10, 1981

AMOUNT US$1,000,000.00

GENTLEMEN:

AT THE REQUEST OF Backstage Club, Inc., 5200 E. Camelback Rd., Phoenix, Arizona

AND FOR THE ACCOUNT OF SAME

WE HEREBY OPEN IN YOUR FAVOR OUR IRREVOCABLE LETTER OF CREDIT FOR SUM OR SUMS NOT

EXCEEDING ***ONE MILLION AND NO/100TH USDOLLARS***

AVAILABLE BY YOUR DRAFT (S) AT SIGHT ON US

AND DOCUMENTS SPECIFIED BELOW

A certified copy of a court order issued by the U.S. Bankruptcy Court for the District of Arizona in cause number B79-890-PHX-VK containing one or more of the following statements:

1. The appeal of Richard Charlton to the U.S. Court of Appeals for the Ninth Circuit from the judgement of April 8, 1981 in the U.S. District Court for the District of Arizona has been dismissed other than by stipulation and the damages suffered by creditors of this estate are in an amount not less than the amount of the draft being presented under the Valley National Bank Letter of Credit dated June 10, 1981.

2. The judgement of April 8, 1981, in the U.S. District Court for the District of Arizona has been affirmed on appeal and the damages suffered by creditors of the estate are in an amount not less than the amount of the draft being presented under the Valley National Bank Letter of Credit dated June 10, 1981.

3. Valley National Bank Letter of Credit No. SLC 1691 was not renewed under the same terms and conditions on or before May 21, 1982 and Mr. C.H. Alberding was so notified on or before May 14, 1982 by hand delivery to Mr. Gary Keltner, Attorney at Law.

PARTIAL DRAWINGS ARE PERMITTED.

WE HEREBY AGREE WITH you that DRAFTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT, THAT SUCH DRAFTS WILL BE DULY HONORED ON PRESENTATION TO THE DRAWEES ON OR BEFORE June 10, 1982*** OR PRESENTED AT THIS OFFICE TOGETHER WITH THIS LETTER OF CREDIT ON OR BEFORE THAT DATE THE AMOUNT OF ANY DRAFTS DRAWN UNDER THIS CREDIT MUST BE ENDORSED ON THE REVERSE HEREOF.

ALL BANKING CHARGES OUTSIDE OF THE U.S.A. ARE FOR THE ACCOUNT OF THE BENEFICIARY.
DRAFTS DRAWN UNDER THIS CREDIT MUST BE ENDORSED AND CONTAIN THE CLAUSE "DRAWN UNDER VALLEY NATIONAL BANK LETTER OF CREDIT NO SLC1691 DATED June 10, 1981

SUBJECT TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1974 REVISION) INTERNATIONAL CHAMBER OF COMMERCE, PUBLICATION NO. 290.

THE VALLEY NATIONAL BANK

CTS

SAMPLE ONLY

FILE COPY

FILED

JUN 12 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: RICHARD CHARLTON, JAMES P. DUNLAVEY, Receiver, Plaintiff-Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, and RICHARD CHARLTON, Debtor-Appellant.	No. 81-5297 DC# CV 81-295 C Arizona (Phoenix) ORDER

Before: BROWNING, Circuit Judge

Upon due consideration of appellant's emergency motion for order determining compliance with this court's order of May 19, 1981, the court issues the following order:

(a) having been informed by counsel for appellant that a $1,000,000 cash bond will be posted, the court finds that the question of the sufficiency of a letter of credit is moot; and

(b) the bond required by the court's order of May 19, 1981 is intended to run to the benefit of Cortez Development Company as well as to the creditors.

United States Circuit Judge

MoCal 6/12/81

JUN 1 . 1

CLERK

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

FOR THE DISTRICT OF ARIZONA

In re RICHARD CHARLTON, Debtor.	)	B-79-890 PHX VM
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	)	B-79-890 "L" PHX VM ✓ ORDER DENYING MOTION

After having carefully considered the history of this case, the pleadings, hearings and the proposed "MOTION FOR ORDER SETTING SEPARATE BOND FOR CORTEZ DEVELOPMENT CORP.", promulgated by the attorneys for the debtor in this matter, therefore the Court now

ORDERS that said Motion shall be and is DENIED.

DATED: June 18, 1981

JUDGE

Copy of the foregoing mailed this 18th day of June, 1981, to:

Gerald K Smith/Neal L. Wolf, Lewis and Roca, First National Bank Plaza, 100 W. Washington Street, Phoenix, Arizona 85003
Jerry Cochran/Michael C. Pierce, Burch & Cracchiolo, P.O. Box 13528, Phoenix, Arizona 85002
John N. Vogel, 7119 First Ave., Scottsdale, Az. 85251
Timothy W. Barton, Jennings, Strouss & Salmon, 111 W. Monroe, 18th Floor, Phoenix, Az. 85003
Philip S. DiMatteo, Boscoe, Ross & DiMatteo, 2100 First Federal Building, 3003 N. Central Ave., Phx., Az. 85012
Steven Feola, Smith & Feola, 14th Floor, Financial Center, 3443 No. Central Ave., Phx., Az. 85012
Dennis I. Wilenchik, Smith & Feola, 14th Floor, Financial Center, 3443 N. Central Ave., Phx., Az. 85012

RECEIVED
JUN 19 1981

Donald L. Gaffney, Streich, Lang, Weeks,, 100 W. Washington, Suite 2100, Phoenix, Az. 85003
Peter J. Rathwell, Snell & Wilmer, 3100 Valley Center, Phoenix, Arizona 85073
John Arnold, Cr. Mgr., Goettl Air Conditioning, % Charles F. Muehlbauer, 2005 E. Indian School, Phx,, Az. 85012
Internal Revenue Service, 2120 No. Central Ave., Phx., Az. 85012
U. S. Attorney's Office, 230 No. First Ave., #4000, Phx., Az.
James H. Colter, Blake & Colter, 2200 No. Central, Suite 104, Phoenix, Az. 85004
Ron Kilgard, Martori, Meyer, Hendricks & Victor, 3500 Valley Bank Center, Phx., Az. 85073
Phoenix Security Systems, Inc., Rabern Enterprises, Inc., % William C. Wulfers, Jr. 7119 First Ave.; Scottsdale, Az. 85251
Wayne N. Howard, Welliever, Smith & Howard, 2544 No. 7th St., Phoenix, Arizona 85005
Arthur Schreiber, 4801 No. 7th St., Phx., Az. 85014
Daniel Cracchiolo/Edwin C. Bull, Burch & Cracchiolo, 2333 No. Central, Phoenix, Arizona 85004
Michael P. McKnight, 2833 No. 3rd St., Phx., Az. 85004
Anthony R. Lucia, Treon, Warnicke, Dann & Roush, 919 No. First St., Phoenix, Arizona 85004
William C. Penn, First Federal Savings Building, 3003 No. Central Avenue, Phoenix, Arizona 85012

Deputy Clerk

BURCH & CRACCHIOLO, P.A.
2333 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004
TELEPHONE (602) 252-7701

Attorneys for Cortez Development Corp.

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	No. B 79 890 PHX VM ORDER

This matter having come on regularly for hearing before this Court on June 11, 1981, at 9:30 a.m. upon special request by Neal Wolf, attorney for the debtor, for determination of approving the form of supersedeas bond as a letter of credit. Telephonic notice of this hearing was given to interested parties. Appearing at the hearing inter alia were the debtor, Richard Charlton, represented by his attorneys, Neal L. Wolf and Gerald K. Smith of Lewis and Roca; Mr. Alberding, the unsuccessful bidder in this matter, represented by his attorney, Gary Keltner of Jennings, Strouss & Salmon; Valley National Bank of Arizona, the issuer of the proposed letter of credit, represented by its attorney, Robert Burns; Cortez Development Corp. represented by Jerry L. Cochran; the receiver James P. Dunlavey, represented by his attorney, Jon Vogel; Camelback Theaters, Inc., represented by Geri Kurtz, of Treon, Warnicke & Roush; Enterprise Leasing,

represented by William Piatt; and First Arizona Mortgage and Investment Company, represented by its attorney, Timothy Barton of Jennings, Strouss & Salmon.

The Court, after hearing arguments of counsel, and considering the written memorandum of law and objection to form of bond and materials attached thereto filed by Cortez Development Corp., finds as follows:

1. The order of this Court setting the amount of bond and the requirement that the bond be filed by June 10, 1981, was entered upon stipulation of the parties.

2. At the request of counsel for the debtor, Neal Wolf, this Court scheduled time at 9 a.m., June 8, 1981 to consider objections to the form of the bond.

3. At that hearing, the Court was advised by Neal Wolf, counsel for the debtor, that no form of bond had yet been submitted to the other parties, as none had yet been obtained.

4. The proposed letter of credit is inadequate as a form of a surety bond.

5. That Cortez Development Corp. is the real party in interest in this matter, and is deserving of the protection of a bond filed for a stay in the amount set by this Court by stipulation of the parties of One Million Dollars.

6. While the Court recognizes that a surety bond was preferable, it may have led counsel for the debtor to explore the use of a letter of credit. Therefore, the Court will consider extending additional time for the debtor to obtain a bond.

Based upon the foregoing,

IT IS ORDERED AS FOLLOWS:

1. The debtor must post a bond in the amount of One Million Dollars, either in cash, or a bona fide surety company in the same form and condition as the bond approved by the Honorable William P. Copple, in the form attached hereto as

Exhibit A.

2. The bond shall be in the amount of One Million Dollars.

3. The bond shall be for the protection of creditors of the estate of Richard Charlton and Cortez Development Corp.

4. The bond must be filed by 5 p.m., June 12, 1981. In the event the bond is not posted in approved form by such time, the stay issued by the Ninth Circuit Court of Appeals under the terms of the order dated May 19, 1981, shall be lifted, and of no further force and effect.

DONE IN OPEN COURT this ___ day of June, 1981.

Judge, U. S. Bankruptcy Court

COPY of the foregoing delivered/
mailed this 4 day of June, 1981, to:

Gerald K. Smith
LEWIS AND ROCA
100 West Washington
Phoenix, Arizona 85003

Jon N. Vogel
7119 First Avenue
Suite 106
Scottsdale, Arizona 85251

Timothy W. Barton
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003

William Piatt
PIATT & LIVONI, P. C.
3225 North Central Avenue
Suite 1205
Phoenix, Arizona 85012

Anthony R. Lucia
TREON, WARNICKE & ROUSH, P. A.
919 North First Street
Phoenix, Arizona 85004

Gary G. Keltner
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003

By _____

COPY
ORIGINAL FILED
ON THIS DATE
APR 24 1981
W. J. Furstenau, Clerk
United States District Court
For the District of Arizona

No. U 30 87 09

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In Re RICHARD CHARLTON, Debtor.	No. CIV 81-295 PHX WPC
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	BOND

KNOW ALL MEN BY THESE PRESENTS:

The we, RICHARD CHARLTON, as Principal and UNITED PACIFIC INSURANCE COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Washington and duly authorized to transact business in the State of Arizona, as Surety, are held and firmly bound unto THE CREDITORS OF THE ESTATE OF RICHARD CHARLTON, Debtor in proceedings under Chapter XI of the Bankruptcy Act presently pending in the Bankruptcy Court of the District of Arizona and entitled No. B-79-890 PHX-VM and CORTEZ DEVELOPMENT CORPORATION, an Arizona corporation, in the full sum of FORTY THOUSAND DOLLARS ($40,000) in lawful money of the United States of America to be

paid to the said CREDITORS and/or CORTEZ DEVELOPMENT CORPORATION, their heirs, executors, administrators, successors and assigns for the payment of which well and truly to be made, the said Principal and Surety hereby bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, on the 8th day of April, 1981, the United States District Court for the District of Arizona, Judge William P. Copple presiding, entered a judgment affirming a February 12, 1981 order of the Bankruptcy Court for the District of Arizona approving a sale of certain real property.

WHEREAS, the Debtor has appealed to the United States Court of Appeals for the Ninth Circuit from the above mentioned judgment and the whole thereof, and

WHEREAS, on April 21, 1981 the United States Court of Appeals for the Ninth Circuit entered an order staying the consummation of the above-described sale for a period of 21 days from the date of entry of the stay order and conditioning the entry of the stay order on the filing with the District Court within 4 days of the date of entry of that order of a bond in the amount of $40,000 in order to protect the creditors of the Estate and Appellee Cortez Development Corporation from any damage that might be caused them as a result of the stay if the appeal is ultimately unsuccessful.

NOW THEREFORE, if for any reason the appeal is dismissed or if the April 8, 1981 judgment of the District Court is affirmed, any damages that may be suffered by the creditors of the Estate of Richard Charlton and Cortez Development Corporation as a result of the stay order entered by the Court of Appeals shall be satisfied in such amount however as shall not exceed the amount of this bond, but if the Debtor shall prosecute his appeal

with effect, this bond shall be of no force and effect.

IN WITNESS WHEREOF, the said Principal has signed these presents and the Surety has likewise signed and executed these presents this 24th day of April, 1981.

RICHARD CHARLTON, as Principal

UNITED PACIFIC INSURANCE COMPANY, a Washington corporation, as Surety

By _____
Its Attorney-in-Fact

APPROVED this 24
day of April, 1981

Honorable William P. Copple
Judge, United States
District Court

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That the UNITED PACIFIC INSURANCE COMPANY, a corporation duly organized under the laws of the State of Washington, does hereby make, constitute and appoint

GEORGE F. DICKINSON of PHOENIX, ARIZONA--------

its true and lawful Attorney-in-fact, to make execute, seal and deliver for and on its behalf, and as its act and deed

ANY AND ALL BONDS AND UNDERTAKINGS OF SURETYSHIP-----

and to bind the UNITED PACIFIC INSURANCE COMPANY thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive Officer of the UNITED PACIFIC INSURANCE COMPANY and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorney(s)-in-fact may do in pursuance hereof.

This Power of Attorney is granted under and by authority of Section 37A of the By-Laws of UNITED PACIFIC INSURANCE COMPANY which provisions are now in full force and effect, reading as follows:

SECTION 37A – ATTORNEYS-IN-FACT

SECTION 1. The Board of Directors, the President, or any Vice-President or Assistant Vice-President shall have power and authority to: (a) appoint Attorneys-in-fact and to authorize them to execute on behalf of the Company, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and (b) to remove any such Attorney-in-fact at any time and revoke the power and authority given to him.

SECTION 2. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof. The corporate seal is not necessary for the validity of any bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof.

This power of attorney is signed and sealed by facsimile under and by authority of the following Resolution adopted by the Board of Directors of UNITED PACIFIC INSURANCE COMPANY at a meeting held on the 26th day of October, 1971, at which a quorum was present, and said Resolution has not been amended or repealed:

"Resolved, that the signatures of such directors and officers and the seal of the Company may be affixed to any such power of attorney or any certificate relating thereto by facsimile, and any such power of attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by facsimile signatures and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or undertaking to which it is attached."

IN WITNESS WHEREOF, the UNITED PACIFIC INSURANCE COMPANY has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, this 23rd day of July 19 79

UNITED PACIFIC INSURANCE COMPANY

Wm. J. Cotter
Vice-President

STATE OF Washington
COUNTY OF Pierce } ss.

On this 23rd day of July, 19 79, personally appeared WM. J. COTTER

, to me known to be the Vice-President of the UNITED PACIFIC INSURANCE COMPANY, and acknowledged that he executed and attested the foregoing instrument and affixed the seal of said corporation thereto, and that Section 37A, Section 1 and 2 of the By-Laws of said Company and the Resolution, set forth therein, are still in full force.

Nancy Starnes

My Commission Expires:
June 12, 19 82

Notary Public in and for State of Washington
Residing at Tacoma

I, Gerald C. Lyon, Assistant Secretary of the UNITED PACIFIC INSURANCE COMPANY, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney executed by said UNITED PACIFIC INSURANCE COMPANY, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Company this 24th day of Dec, 1981

Gerald C. Lyon
Assistant Secretary

BDU-1431 ED.2-72

Best Copy Available

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: RICHARD CHARLTON, Debtor.	No. 81-5297 D.C. # CIV 81-295 PHX WPC U.S. Bankruptcy Court No. B 79-890 PHX VM
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants. RICHARD CHARLTON, Debtor/Appellant.	MOTION TO DISMISS DEBTOR'S APPEAL

COMES NOW, Cortez Development Corp., through counsel undersigned, the purchaser of the property in the bankruptcy proceeding and the appellee herein, and hereby respectfully requests this Court to dismiss the debtor's appeal since it has been now rendered moot. This motion is brought pursuant to rule 27, Federal Rules of Appellate Procedure, and rule 6, Rules of the United States Court of Appeals for the Ninth Circuit, and is supported by the record herein and the attached Memorandum of Points and Authorities.

BURCH & CRACCHIOLO, P. A.

By _____
C. Michael Pierce
Jerry L. Cochran

MEMORANDUM OF POINTS AND AUTHORITIES

Summary

This matter arose from an appeal of the debtor, Richard Charlton, in the estate of Richard Charlton from an order of the Bankrutpcy Court dated February 12, 1981 approving the sale of real property free and clear from all liens to Cortez Development Corp. for the sum of $1,175,000.00. This order was subsequently affirmed by the United States District Court, the Honorable William P. Copple, by order dated April 8, 1981.

On or about May 19, 1981, this Court entered an order staying the Bankruptcy Court's order of February 12, 1981 pending its appeal. The stay was conditioned upon the debtor's posting of a bond in an amount that was fully adequate to pay all creditors, including this appellee. Because the debtor's bond did not fulfill the requirements of the May 19, 1981 order, on or about June 19, 1981, escrow closed in the sale of the real property in controversy and a trustee's deed of real property was recorded in the Name of Seventh Camel Associates, a joint venture partnership, which was acting on behalf of appellee, Cortez Development Corp. (see Exhibit A). As a result of the June 19, 1981 recordation, appellant's appeal of the United States District Court's judgment authorizing the sale of the real property is moot since legal ownership of the property is now vested

in appellee and, thus, there is no case or controversy for this Court to decide.

Statement of the Facts

The debtor/appellant herein, Richard Charlton, filed an application for Chapter XI reorganization under the Bankruptcy Act on or about May 7, 1979. On or about January 13, 1981, a notice to creditors of sale of real property and of a receiver's application to compromise claims was mailed to all creditors and interested parties for hearing noticed on February 2, 1981. (Docket Nos. 41, 42, and 43) At the hearing, the judge entered an oral order approving the sale of real property to appellee, Cortez Development Corp. for the amount of $1,175,000.00. (Docket No. L-21, Exhibit 3). A formal order approving the sale was signed on or about February 12, 1981. (RT February 2, 1981, page 51, line 21 to page 52, line 19).

At the scheduled hearing on February 2, 1981, Alberding, an unsuccessful bidder on the real property supported by the debtor/appellee, made an offer which provided that Alberding would pay $875,000.00 cash and take the property subject to a theater lease. Although Alberding filed an amended offer of $975,000.00 four days after the February 2, 1981 hearing, the Bankruptcy Court held that this offer was late and not valid (order of May 18, 1981).

Mr. Alberding had failed to attend the original hearing, but was represented by agents who were unable to make any binding

commitments on his behalf. Mr. Alberding's agents had appeared at the sale hearing, listened to all bids, and then passed this information to Alberding so that after the hearing he could submit a new bid to the Court. This procedure jeopardized the previously approved sale to Cortez Development Corp. and cast uncertainty over the procedure whereby property was sold through the Bankruptcy Court.

Thereafter, at hearing on May 13, 1981, Alberding, again through counsel for Charlton, (who are being paid by Alberding), filed a new offer to supersede all previous offers. The total price was $1,175,000.00 with $975,000.00 due on closing; however, the note representing this amount was unsecured, nonnegotiable, and payable over ten years. Furthermore, the offer was contingent upon Mr. Alberding obtaining financing (see Paragraph 29E).

By contrast, the Cortez Development Corp. sale provided that the full $1,175,000.00 would be paid by September, 1981. Furthermore, because of construction financing commitments, Cortez Development Corp. will pay the entire amount due on close.

On or about May 19, 1981, this Court entered an order which stayed the Bankruptcy Court's judgment approving the sale of real property to Cortez Development Corp. pending debtor's appeal (see Exhibit B). The stay was conditioned upon debtor's posting of a bond in the amount that was fully adequate to pay

all creditors. The appellant stipulated that the amount of the bond would be $1,000,000.00 and that the bond would be filed by June 10, 1981. A letter of credit was posted as a supersedeas bond and delivered to the Bankruptcy Court. The Bankruptcy Court determined that the form of the bond was inadequate because it did not provide the same protections to the estate as a surety bond and that Cortez Development Corp. was entitled to the protections of law as an appellee that are given for supersedeas bond for damages that it may suffer from delay.

As a result of the inadequate bond being posted, the stay entered by this Court of the sale of real property to Cortez Development Corp. was lifted. On or about June 19, 1981, Pioneer National Title Insurance Company closed escrow No. 101652 SRA evidencing completion of the sale of the real property. The escrow instructions designated James P. Dunlavey, trustee of the estate of Richard Charlton, bankrupt, as the seller and Seventh Camel Associates, a joint venture partnership, as buyer. In the purchase of the property, Seventh Camel Associates was acting on behalf of Cortez Development Corp. The deed representing the property subject to this escrow was recorded on or about June 19, 1981 (see Exhibit A).

Legal Argument

This Court should now dismiss the debtor's appeal since the basis of that appeal has been rendered moot due to events

which occurred during the pendency of the appeal. The general rule in federal cases requires that an actual controversy exists at all stages of appellate review "and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125 (1973). In examining appellate jurisdiction, this court has stated:

> Our appellate jurisdiction generally attaches only to those aspects of a case that continue to present an actual case or controversy. Conversely, when a genuine controversy no longer exists at the appellate state, and is incapable of legitimate repetition, the cause is moot and we lose jurisdiction.

Krause v. Sacramento Inn, 479 F.2d 988, 990 (9th Cir. 1973). In other words,

> When events during the pendency of the appeal have eliminated any possibility that the court's order may grant meaningful relief affecting the controversy that precipitated the litigation, applicable doctrine permits, and judicial administration generally calls for, dismissal of the appeal.

Alton & Southern Railway v. International Association of Machinists & Aerospace Workers, 463 F.2d 872, 877-78 (D.C. Cir. 1972).

This court has frequently held that an appeal from a Bankruptcy Court order approving a sale or a lease of an asset in the bankrupt estate is moot if a stay is not entered or fulfilled and the sale is consumated. See, e.g., Royal Properties, Inc. v. Casady, 621 F.2d 984, 986-87 (9th Cir. 1980); In re Combined Metals Reduction Co., 557 F.2d 179, 193 (9th Cir. 1977).

In the case at bar, events during the pendency of the appeal have vitiated the case or controversy appellant claims as the basis of his appeal. By closing escrow and recording the trustee's deed, the basis of the debtor's appeal is vacated since the legal interest in the property is now vested in Seventh Camel Associates, acting for Cortez Development Corp. The property was conveyed to Seventh Camel Associates by James P. Dunlavey in his capacity of trustee for the bankrupt, Richard Charlton Enterprises.

The debtor freely admits that if the sale of the real property to Cortez Development Corp. closes, the appeal of the Bankruptcy Court's decision will be mooted. "This is an emergency matter because the property, which is worth more than one million dollars, will in fact be sold and the appeal will be mooted before the matter can come here in the absence of a stay, as is supported by the attached memorandum." Debtor's Emergency Motion for Stay in Aid of Appeal, p.1. See also Memorandum in Support of Application for Stay of Order Pending Appeal, pp. 14-16. Furthermore, in the interest of judicial economy a moot appeal should be dismissed.

Conclusion

The whole purpose of this appeal by the debtor was to prevent the sale of the real property--to appeal the order permitting the sale. The appeal was only viable as long as

appellant could postpone the sale, which he sought to do by his request for a stay pending appeal. That stay was granted conditioned upon appellant providing a bond in accordance with the court's order. Appellant did not post a sufficient bond, resulting in the stay being lifted and the sale consummated. Thus, the event sought to be avoided by this appeal has not only happened, but it has occurred because appellant did not comply with an order of the court. Under these circumstances, the appeal must now be deemed moot and accordingly dismissed. See Royal Properties, Inc. v. Casady, 621 F.2d 984 (9th Cir. 1980); In re Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977); Parsons Investment Co. v. Chase Manhattan Bank, 466 F.2d 869 (6th Cir. 1972); Sterling v. Blackwelder, 405 F.2d 884 (4th Cir. 1969)(per curiam); Pacific Inter-Club Yacht Association v. Morris, 288 F.2d 886 (9th Cir. 1961)(per curiam); Taylor v. Austrian, 154 F.2d 107 (4th Cir. 1946)(per curiam).

RESPECTFULLY SUBMITTED this 23rd day of June, 1981.

BURCH & CRACCHIOLO, P. A.

By _____
C. Michael Pierce
Jerry L. Cochran
P. O. Box 13528
Phoenix, Arizona 85002
Attorneys for Cortez
Development Corp.

When recorded, mail to:
Jerry L. Cochran,
BIRCH & CHACKFIELD, P.A.
P.O. Box 13520
Phoenix, AZ 85002

PIONEER NATIONAL TITLE INSURANCE COMPANY

In 15324 Pg 490

TRUSTEE'S DEED OF REAL PROPERTY

US LIFE
DO-62409

THIS INDENTURE made of the 17th day of JUNE, 1981, between JAMES P. DUNLAVEY, Trustee in the matter of Richard Charlton [redacted], Debtor in proceedings for Bankruptcy No. 79-890 PHX VM, Party of the First Part, and SEVENTH CAMEL ASSOCIATES, an Arizona joint venture, Party of the Second Part:

WITNESSETH:

The Party of the First Part by virtue of the power and authority given in and by the United States District Court for the District of Arizona, and in consideration of TEN DOLLARS ($10.00) and other valuable consideration, paid by the Party of the Second Part, does hereby grant, convey and release unto the Party of the Second Part, and assigns forever, the following described real property:

PARCEL NO. 1:

The South 130 feet of Lot 8, of LINCOLN PLACE, per map recorded in Book 3, Page 65 of Maps, in the office of the County Recorder of said county;
EXCEPT the West 7 feet as conveyed to the City of Phoenix, by Deeds recorded in Docket 3692, Page 50, and in Docket 3692, Page 52.

PARCEL NO. 2:

That part of Lot 9, of LINCOLN PLACE, per map recorded in Book 3, Page 65 of Maps, in the office of the County Recorder of said County, described as follows:
BEGINNING at the intersection of the center line of Highland Avenue with the center line of 7th Street as shown on said plat of Lincoln Place, said point being the Southwest corner of the Northwest quarter of the Northwest quarter of Section 21 Township 2 North Range 3 East of the Gila and Salt River Base and Meridian; thence North along the center line of 7th Street 519.88 feet to the true point of beginning; thence North 89 degrees 55 minutes East to a point on the East line of said Lot 9, distant 519.84 feet North of the Southeast corner of the Southwest quarter of the Northwest quarter of the Northwest quarter of said Section 21, thence Northerly along the East line of said Lot 9, a distance of 139.84 feet, more or less, to the Northeast corner of Lot 9; thence South 89 degrees 55 minutes West along the North line of Lot 9, a distance of 666.42 feet, more or less to the Northwest corner of the Southwest quarter of the Northwest quarter of the Northwest quarter of Section 21, being in the center line of 7th Street; thence Southerly along center line of 7th Street, 139.88 feet to the point of beginning;
EXCEPT that part lying within 7th Street; and
ALSO EXCEPT the West 7 feet of the North half of said Lot 9, as conveyed by Quit-Claim Deed recorded May 12, 1961, in Docket 3695, Page 52, by Quit-Claim Deed recorded May 12, 1961 in Docket 3695, Page 53, by Quit-Claim Deed recorded May 12, 1969 in Docket 3695, Page 54 and by Quit-Claim Deed recorded May 12, 1961 in Docket 3695, Page 55.

together with the appurtenances and also all the estate which the Party of the First Part has or has power to convey or dispose of as Trustee in the matter of Richard Charlton [redacted], Debtor in proceedings for Bankruptcy.

Best Copy Available

EXHIBIT A

DKT 15324 PG 491

SUBJECT TO: All taxes, assessments, easements, restrictions, liens and encumbrances of record.

IN WITNESS WHEREOF, the Party of the First Part has hereunto set his hand and seal the day and year first above written.

James P. Dunlavey
JAMES P. DUNLAVEY, as and only as Trustee in the matter of Richard Charlton [redacted] Debtor in proceedings for Bankruptcy.

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this 17th day of JUNE, 1981, before me personally appeared JAMES P. DUNLAVEY, Trustee in the matter of Richard Charlton [redacted], Debtor in proceedings for Bankruptcy No. 79-890 PHX VM, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Judy Klawonn
Notary Public

My commission expires:

7-24-82

JUDY K. KLAWONN

JUN 19 1981 •11 52

STATE OF ARIZONA,
County of Maricopa } ss

I hereby certify that the within instrument was filed and recorded at request of [redacted]

in Docket [redacted]
on page 480-487
Witness my hand and official seal the day and year aforesaid.
Neil Henry
County Recorder
By [redacted]
Deputy Recorder

5.00

Best Copy Available

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 19 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

In re: RICHARD CHARLTON,
Debtor.

No. 81-5297

JAMES P. DUNLAVEY, Receiver,
Plaintiff/Appellee,
vs.
ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al.,
Defendants,
RICHARD CHARLTON,
Debtor/Appellant.

D.C. #CV81-295 C
ARIZONA (PHOENIX)

ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) The bankruptcy court's order of February 12, 1981 is stayed pending appeal. The stay is conditioned upon appellant's posting of a bond in an amount that is fully adequate to pay all creditors. The bankruptcy court shall determine the amount of the bond and the time within which it must be posted;

(b) The certificate of record, heretofore received, is ordered filed;

(c) The parties shall make arrangements with the clerk of the district court for the prompt supplementation of the record with any documents and transcripts relevant to the proceedings that took place in the bankruptcy court pursuant to this court's orders of April 20, 1981 and May 1, 1981;

(d) The clerk shall calendar the appeal for argument in August 1981 or as soon thereafter as practicable;

(e) The parties shall comply with the following briefing schedule:

(1) Appellant shall file his opening brief on or before June 5, 1981;

(2) Appellees shall file their responding brief on or before June 24, 1981;

(3) Appellant may file a reply brief on or before July 6, 1981; and

(f) No extensions of time will be granted except under extraordinary circumstances.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re RICHARD CHARLTON, Debtor.	No. B81-5297 D.C. # CIV 81-295 PHX WPC U.S. Bankruptcy Court
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants. RICHARD CHARLTON, Debtor/Appellant.	No. B 79-890 PHX VM RESPONSE TO MOTION TO DISMISS DEBTOR'S APPEAL

JURISDICTION

Richard Charlton, the Debtor/Appellant herein, respectfully requests, through counsel undersigned, that this Court deny Cortez Development Corporation's Motion to Dismiss the Debtor's Appeal. This Response is brought pursuant to Rule 27, Federal Rules of Appellate Procedure, and Rule 6, Rules of the United States Court of Appeals for the Ninth Circuit, and is supported by the record herein, Statement of Facts and Argument.

STATEMENT OF FACTS

1. This is an appeal from a District Court order affirming a Bankruptcy Court order approving a liquidation sale of substantially all of the assets of a Chapter XI debtor over the objection of the debtor, in the face of a

proposed Chapter XI Plan which had been accepted by a requisite number of creditors.

2. On May 19, 1981 this Court entered an Order staying the sale pending appeal, conditioning the stay upon the posting by the debtor of a bond in an amount and within a time to be determined by the Bankruptcy Court, and accelerating the briefing and argument of the appeal.

3. On or about May 28, 1981, Bankruptcy Judge Vincent D. Maggiore entered an order requiring the debtor to post a bond in the amount of one million dollars no later than 5:00 P.M. on Wednesday, June 10, 1981. (See 6/11/81 Hearing Transcript and May 28, 1981 Order). Bankruptcy Judge Maggiore subsequently extended the filing deadline until 5:00 P.M. on Friday, June 12, 1981. (See 6/11/81 Hearing Transcript).

4. In obtaining the requisite one million dollar bond, Charlton sought the assistance of Mr. C. H. Alberding ("Alberding"), to whom Charlton seeks to sell the subject property through his proposed plan of arrangement. Mr. Alberding agreed to assist Charlton in obtaining and posting such bond. (See Alberding affidavit, attached hereto as Exhibit "A").

5. On Wednesday, June 10, 1981, Cortez Development Corp. (Cortez") informed Alberding's attorney by means of a letter bearing that date that Cortez would sustain approximately $900,000.00 in compensable damages as a result of any delay in the close of escrow arising out of

the stay order. The letter stated that Cortez "will sustain" very substantial damages due to delay on the appeal "which we intend to pursue on this bond if we are successful." The letter referred to and enclosed a memorandum stating, in relevant part:

> In April, Cortez was able to obtain permanent financing on the 6.4 million dollar project for 12 1/2%. Today that financing cannot be obtained for less than 13 1/2%. A 1% difference on 6.4 million dollars is a loss of $64,000 per year. The present value of this loss discounted at 10% for 30 years is $606,656.83.*
>
> Secondly, construction costs have averaged an increase of 1 1/2% per month in the Phoenix area. This was previously testified to at the original bond hearing on March 12, 1981. The estimate is that the construction costs on the project will be 3.7 million dollars. The increase is about $55,000 per month. If one again assumes that this appeal can be decided in 6 months the amount needed is $330,000. Cortez' total estimated damages for delay are $909.656.83. (Letter and memorandum, Ex. B.)

(See Keltner affidavit, attached hereto as Exhibit "C").

6. Prior to June 10, 1981, neither Alberding nor his attorneys had seen the Cortez memorandum asserting the $900,000.00 exposure or been informed of such claim. (See Alberding and Keltner affidavits).

7. At the time of the April hearing before this Court on the debtor's Emergency Motion For Stay In Aid Of Appeal, Cortez stated that a bond of $40,000.00 would be more than sufficient to protect both the creditors of the estate and Cortez from any damages resulting from a delay of

about a month. Hence, with the knowledge and consent of Cortez, this Court required the debtor to post a $40,000.00 bond as a condition of the initial stay order of April 20, 1981, which bond was ultimately posted and renewed by the debtor. (See April 20, 1981 Order).

8. As a direct result of the representation by Cortez that it would suffer approximately $900,000.00 in damages arising out of the stay, Alberding refused to post a bond naming Cortez as a beneficiary. (See Alberding affidavit).

9. Alberding elected to post a one million dollar cash bond solely in favor of the creditors of the estate. True and correct copies of that bond and of the document by which the bond was submitted to the Bankruptcy Judge are attached hereto as Exhibit "D-1" and "D-2". (See Keltner affidavit).

10. The one million dollar cash bond was not approved by the Bankruptcy Judge. (See Keltner affidavit).

11. Between 4:00 and 5:00 p.m. on June 12, 1981, this Court entered an order requiring that the bond run to the benefit of Cortez as well as creditors. (See June 12, 1981 order).

12. At 5:00 P.M. on Friday, June 12, 1981, the stay order expired. (See 6/11/81 Hearing Transcript).

13. On Tuesday, June 16, 1981, the Debtor moved for a Bankruptcy Court order setting a separate bond for Cortez, objecting that there had been no judicial

determination regarding what portion of the one million dollar bond should run to Cortez, and seeking an accelerated hearing on the subject. (See 6/16/81 Motion for Order Setting Separate Bond for Cortez Development Corp., a true and correct copy of which is attached hereto as Exhibit "E").

14. On Thursday, June 18, 1981, the foregoing Motion was denied without responsive memorandum or a hearing. (See 6/18/81 Order Denying Motion, a true and correct copy of which is attached hereto as Exhibit "F").

15. On or about June 19, 1981, the sale of the property apparently closed. On that date, the Receiver gave a Trustee's [sic] Deed of Real Property not to Cortez but to Seventh Camel Associates, an Arizona joint venture. (See Motion to Dismiss and Trustee's Deed attached thereto, the latter of which is attached hereto as Exhibit "G").

16. In spite of its assertion that it would suffer $900,000.00 in damages arising out of increased construction costs and interest rates caused by a stay order, Cortez did not even purchase the subject property. (See Exhibit "G").

17. Cortez now moves to dismiss the appeal, claiming that it was mooted by the June 19, 1981 closing.

ARGUMENT.

A. The Appeal Cannot be Mooted Absent a Factual Determination that Seventh Camel Associates is a Good Faith Purchaser of the Property; this Court Cannot Make that Determination.

Cortez would have the Court believe that the mere occurence of the closing moots the appeal. That is simply not the law. Only a sale to a "good faith purchaser" can moot the appeal. To date, there has been no determination that Seventh Camel Associates is a good faith purchaser. The debtor does not even know the names of the joint venturers constituting Seventh Camel, let alone their relationship to Cortez and Cortez' attorneys.

The principle that a sale to other than a good faith purchaser does not moot an appeal can be found in Bankruptcy Rule 805 which is made applicable to Chapter XI proceedings by Bankruptcy Rule 11-62. Traditionally, a good faith purchaser is one who purchases the assets for value, in good faith, and without notice of adverse claims. In Re Rock Industries Machinery Corp., 572 F.2d 1195 (7th Cir. 1978). Whether or not a purchaser has acted in good faith is a question that involves a mixture of both law and fact. Fraud, collusion between the purchaser and other bidders or the Trustee, or an attempt to take grossly unfair advantage of other biders can all destroy a purchaser's good fatih status. See, e.g., In Re Rock Industries Machinery Corp., supra, at 1198:

> The requirment that a purchaser act in good faith, of course, speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

See also In Re Webcor, Inc., 392 F.2d 893 (7th Cir. 1968)

Notice of adverse claims can also destroy good faith purchaser status. See In re Rock Industries Machinery Corp., supra. A purchaser has such notice if he has actual knowledge of defects in the title or knowledge of such facts and circumstances as would have put a man of ordinary circumspection on inquiry. In re Rock Industries Machinery Corp., supra; Meisiron v. Duggan, 240 F.2d 751 (8th Cir. 1957).

Moreover, although under the applicable Rules of Bankruptcy Procedure mere knowledge of the pendency of an appeal does not deprive the purchaser of good faith status, such knowledge may be relevant in determining the purchaser's good faith status. See, e.g., Local Joint Executive Board, AFL-CIO v. Hotel Circle, Inc., 419 F.2d 778, 783 (S.D. Cal. 1976):

> Under the provisions of rule 11-62(2), the sale to a "good faith" purchaser will not be distrubed by a modification, on appeal, of an order approving the sale of property. Absent a stay of the order approving the sale, the sale to a good faith purchaser will not be affected. However, the rule does not shield a purchaser who has not proceeded in good faith. Mere knowledge

of the pendency of an appeal does not deprive the purchaser of the protection of rule 11-62(2), but knowledge may be relevant in determining the purchaser's good faith status.

B. There is Evidence That Seventh Camel Did Not Act In Good Faith.

This Court is powerless to make a determination of the presence or absence of Seventh Camel's good faith. It is elementary that an appellate court does not sit as a fact finding body, but must defer to the lower court to carry out that aspect of the judicial task. Indeed, to the extent that this Court inquires into the good faith purchaser status of Seventh Camel, it invades the province of the Bankruptcy Court's jurisdiction as the sole finder of fact. Before such a determination as this could be made, some discovery and an evidentiary hearing in the Bankruptcy Court would have to be conducted. In light of the facts that Appellant's Reply Brief will be filed on July 6, 1981 and oral argument will take place shortly, it makes good sense to proceed with the appeal. If the District Court order is affirmed, then no good faith hearing need be conducted. If it is reversed, then the hearing can be conducted on an accelerated basis.

Although we do not know the relationship between Cortez, Cortez' attorneys, and Seventh Camel, we do know that Seventh Camel was the nominee of Cortez to purchase the property and we do have some newly-discovered evidence of bad faith. Cortez induced Alberding to restrict his

tendered one million dollar cash bond to the creditors of the estate and to exclude Cortez from the protection of such bond by the representation that Cortez "will sustain" in excess of an estimated $900,000.00 in damages as a result of a stay order. We believe, although we will not be able conclusively to demonstrate this fact until discovery is conducted, that Cortez' attorneys made this representation at a time when they knew that Cortez would not be the purchaser of the property, would not incur construction costs, would not obligate themselves to pay additional interest, and would not be damaged by the continuation of the stay order. If so, the argument made by Cortez that it must be a beneficiary of the bond and that it would suffer damages as a result of the stay was a sham, calculated to prevent Alberding from posting the necessary bond and to cause the stay to expire. The representations accomplished their purpose, but they very well may deprive Cortez and its nominee, Seventh Camel, of the good faith status necessary to obtain a dismissal of this appeal.

The Debtor perhaps would have learned many of the relevant facts if the Bankruptcy Court had granted his Motion for Order Setting Separate Bond in the amount of Cortez' actual exposure. In that event, Mr. Alberding would have considered posting a separate bond for Cortez. (See Alberding Affidavit.) The Motion was denied without hearing however, and the debtor did not learn that Cortez would not

be the purchaser until June 25, 1981 when he received a copy of the Motion to Dismiss and accompanying Trustee's Deed.

C. Seventh Camel Had Notice of Adverse Claims.

Cortez and its nominee, Seventh Camel, knew that the purchase was being made from a receiver in a Chapter 11 proceeding. They both knew that there was a question as to whether the receiver had the power to make the challenged sale. They also knew that, even if he had such power, he could not sell property which did not belong to the Estate.

The question of the Receiver's power to make the sale, which was a sale of substantially all of the assets of the Debtor, in the face of a proposed Chapter 11 Plan which had been accepted by a requisite number of creditors and over the Debtor's objection, constitutes the heart of the Debtor's appeal. If, by closing the sale in the face of the Debtor's challenge of that power, Cortez and Seventh Camel have mooted the appeal, the effect of their action is to create a power in the Receiver to sell which, if the Debtor is correct, did not exist.

This is not a case such as that of In Re Rock Industries Machinery Corp., supra, involving mere procedural irregularities. In that case, there was no question concerning the trustee's power to sell certain of the subject assets and to quit-claim whatever interest the trustee had in the remaining assets. The sale was not challenged by the debtor for lack of any such power. Rather, the sale was challenged by a third person claiming

an interest in the quit-claimed assets. That person was not divested of any property rights by the sale, since it purported only to transfer whatever rights the trustee had in and to such property. The sole basis of the third person's challenge was that the proceedings leading to the sale were procedurally irregular in that the notice of sale contained an inadequate description of the assets to be sold and the Court abused its discretion in permitting the trustee to hold what was, in effect, a private sale.

In our case, the sale does purport to divest the Debtor of his rights in the subject property. The Debtor challenges the sale, not merely because it was procedurally irregular, but because the Receiver was powerless to make it. If the Receiver, Cortez and Seventh Camel are allowed to moot the Debtor's appeal by having closed the sale, they will have foreclosed by their collective action the Debtor's right to a determination of whether they acted properly in taking the property from his estate. If the Debtor's arguments are correct, they will by their collective closure, have ratified and confirmed to themselves the benefits of their own misconduct. We suggest that this is not the purpose of result contemplated by Bankruptcy Rule 805.

In addition, it is clear from documents filed in this Court that Cortez and Seventh Camel knew that the Receiver was purporting to sell, and that the deed to Seventh Camel purported to convey, assets which the Receiver

did not own. The purchase Contract and Receipt dated February 3, 1981 between Cortez and its nominee and the Receiver (Exhibit B to Cortez' Opening Brief) states that the Receiver shall convey clear and marketable title and that there shall be no leases, liens or other claims against the property. If the Receiver had the power to sell at all, he had the power only to sell the property of the estate. While he could, pursuant to proper procedures, sell that property free and clear of liens and encumbrances, he could not sell that property free and clear of valid leasehold interests and other interests which created in others a vested estate in and to the subject property. Yet that is exactly what he purported to do and what Cortez and its nominee purported to have him do.

Before doing, the attorneys for Cortez and the Receiver talked about "the problem" of "the Schreiber Lease" (see Exhibit 5 to Cortez' Opening Brief). Mr. Schreiber has a leasehold interest in the subject property with an expired term. He was and remains in the possession of a portion of the subject property pursuant to that lease. The Bankruptcy Court had no power by the sale to divest him of his leasehold interest. Indeed, the order for sale made and entered by the Bankruptcy Judge on February 12, 1981 purports only to sell free and clear of "liens and encumbrances" and directs that the proceeds from the sale be held by the Receiver "subject to the claims of secured creditors" (refer to Order Approving Sale of Real Property

Free and Clear of Liens and Encumbrances to Att to Proceeds and Approval of Compromise, Settlement with Lessees). Nevertheless, the attorney for Cortez advised attorney for the Receiver by letter dated May 19, 1981 of his belief "that the order adequately eliminates any claim Schreiber has to the property" and suggested that the attorney for the trustee "contact Mr. Schreiber and have him make a claim to the estate for the value of his unexpired term of the lease" (see Exhibit 5 to Cortez' Opening Brief). Cortez' attorney asserted that the Receiver "clearly has the power under 353 with adequate compensation to terminate the executory portion of this lease." The reference to 353 appears to refer to § 363 of the Bankruptcy Reform Act of 1978. That section applies only to "property of the estate." The Schreiber leasehold interest is not the property of the estate.

Thereafter, the attorneys for Cortez prepared and, without prior notice to the Debtor, submitted to the Bankruptcy Judge an "Amended Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances with Liens and Encumbrances to Attach to Proceeds and Approval of Compromise, Settlement with Lessees" (see attached Exhibit "H"). That order recited that "for purposes of insuring marketable title" it was to be entered nunc pro tunc to specifically set forth the liens, encumbrances "and leases" which were to be released from the subject property and attached to the proceeds of sale. The proposed amended

order included an order that the sale be free and clear of "leases" as well as liens and encumbrances, and that the leases, as well as liens and encumbrances, attach to the proceeds of sale. It deleted the prior reference to the proceeds as being subject only to the claims of "secured creditors." The proposed amended order then proceeded to enumerate the various entities whose liens, encumbrances and leases were being transferred from the property to the proceeds. The enumeration includes Mr. Schreiber. The Bankruptcy Judge refused to sign the order and the sale was closed without such order.

Since that time, by letter dated June 19, 1981, the attorneys for Cortez and/or Seventh Camel, purporting to be acting "on behalf of the Cortez Development, the owners of the property which you formerly leased from Mr. Charlton" have notified Mr. Schreiber that he has until 5:00 p.m. August 3, 1981 to vacate the premises and that "if you have any claim, your lease has been dealt with through the Bankruptcy Court, and you should communicate with that Court" (see attached Exhibit "I"). On the same date, the attorneys for Cortez, "on behalf of Cortez Development, the title owner of the Sombrero Playhouse Property," notified the Debtor that he had a similar deadline for removal of buildings and personalty from the proeprty (see attached Exhibit "J"). The attorneys for Cortez and/or Seventh Camel have advised that, after that deadline, "all items on the site will be razed or removed" and that "bulldozers [will]

enter the site on August 4, 1981" (see attached Exhibit "K").

The proposed amended order approving sale which the attorneys for Cortez and/or Seventh Camel attempted to have the Bankruptcy Judge sign and the title policy requirements set forth on the exhibit to that proposed amended order suggest that there may be adverse interests of persons other than Mr. Schreiber which Cortez and/or Seventh Camel are attempting to bulldoze over. Whether there are or not, their knowledge of Mr. Schreiber's adverse interest deprives them of the status of a good faith purchaser. Moreover, their actions with regard to the Schreiber situation and the proposed amended order opposing sale clearly indicate that they are not good faith purchasers.

CONCLUSION

For all the foregoing reasons the Motion to Dismiss Debtor's Appeal should be denied.

DATED this 2d day of July, 1981.

LEWIS AND ROCA

By Geoffrey H Walker
Gerald K. Smith
Neal L. Wolf
Geoffrey H. Walker

Copies of the foregoing hand delivered this 2d day of July, 1981, to:

A F F I D A V I T

STATE OF ILLINOIS)
) ss.
County of Cook)

C. H. ALBERDING, being first duly sworn upon his oath, deposes and says:

1. I am an adult who is competent to make this Affidavit.

2. This Affidavit is based upon my personal knowledge of the events described.

3. Subsequent to the May 28, 1981 Order entered by Bankruptcy Judge Maggiore, I was approached by the Debtor, Richard Charlton, who sought my assistance in posting the $1,000,000 Bond required by that Order. I advised Mr. Charlton that I would endeavor to assist him in posting a Bond in the sum of $1,000,000 as required by the Bankruptcy Court.

4. On June 10, 1981, I was informed by my attorney, Gary G. Keltner, that Cortez was claiming approximately $900,000 damages arising from the Stay Order. Prior to that time it had been my understanding that the damages claimed by Cortez were of a much smaller magnitude. The Cortez claim was set forth in a June 10, 1981 letter from Cortez' attorneys to Mr. Keltner, which enclosed and referenced a Cortez Memorandum of Law Regarding Setting of Bond. Gary Keltner had delivered to me a copy of the Cortez letter and memorandum and based on the extremely large claim asserted by Cortez, expressed serious concerns regarding the effect of posting a Bond which included Cortez as a beneficiary. These concerns were reiterated by attorneys for the Debtor, and ultimately led to my decision not to assist in obtaining a $1,000,000 Bond running to the benefit of Cortez. I would, however, have assisted in obtaining a separate Bond running to the benefit of Cortez in a lesser amount.

5. Prior to my attorney's receipt of the June 10 letter and memorandum, I had not seen nor been informed of any evidence

LAWYERS
FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

supporting a Cortez damage claim which would have exceeded $40,000, which was the amount previously requested by Cortez and made the subject of an already posted Bond.

6. Accompanied by Gary Keltner and Richard Charlton on June 12, 1981, I obtained a Cashier's Check from Valley National Bank in the amount of $1,000,000. However, I was unwilling in the face of Cortez' claim of in excess of $900,000 damages to have the Bond posted for the benefit of Cortez. My unwillingness in this regard was the direct result of Mr. Cochran's June 10, 1981 letter. Had it not been for that letter, I would have been willing to have a Bond posted for the benefit of Cortez also. Richard Charlton submitted the Cashier's Check as a cash Bond running to the benefit of all creditors of the estate, but not to Cortez Development Corp. Bankruptcy Judge Maggiore refused to accept and approve the Bond I had assisted Mr. Charlton in obtaining. Specifically, his refusal was based upon the fact that the Bond did not run to the benefit of Cortez.

7. Later on June 12, 1981, I was informed of this Court's ruling that Cortez must be included as a beneficiary under the Bond. Because of Cortez' June 10, 1981 letter and memorandum which claimed approximate damages of $900,000, I was unwilling to assume this additional and substantial risk, and consequently elected not to post a Bond including Cortez as a beneficiary.

C. H. Alberding
C. H. ALBERDING

SUBSCRIBED AND SWORN to before me this 2nd day of July, 1981.

Rhonda R Cochran
Notary Public

My Commission Expires:
My Commission Expires June 26, 1984

LAWYERS
FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

LAW OFFICES
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June 10, 1981

HAND DELIVERED

Mr. Gary G. Keltner
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003

Re: Alberding/Charlton

Dear Gary:

I have now had it confirmed that Mr. Alberding will in fact be backing Mr. Charlton in his efforts to obtain a bond on his appeal. I have reviewed with you the proposed letter of credit which is to be obtained as the bond. This letter is to advise you of the potential risks that Mr. Alberding may have on this bond if we are successful on our appeal in affirming the Bankruptcy Court judge, which I believe we will be.

In addition to the interest that is accrued on the outstanding debts of the estate at $10,000 per month, my client, Cortez Development Corp., will sustain very substantial damages due to delay on this appeal which we intend to pursue on this bond if we are successful. These damages are set forth in the memorandum of law regarding setting of bond which I prepared for the bond hearing and provided a copy to Neil Wolf at the hearing. Attached with that is the decision of Moore v. Townsend which supports our position for these damages, if we are successful.

If I can answer any questions that you or your client may have, please feel free to call.

Sincerely,

Jerry L. Cochran
For the Firm

JLC:ss

EXHIBIT B

BURCH & CRACCHIOLO, P.A.
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Attorneys for Cortez Development Corp.

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	NO. B 79 890 PHX VM B 79 890 L PHX VM MEMORANDUM OF LAW REGARDING SETTING OF BOND.

CORTEZ DEVELOPMENT CORP., through counsel undersigned presents this Memorandum to the Court to aid the Court in setting the amount of the Supersedeas bond. This matter is being heard by this Court on remand from the Ninth Circuit to set the bond "in an amount fully adequate to pay all creditors." In addition, this Court must also pursuant to the rules set a bond adequate to compensate all appellees, including Cortez for damages incurred as a result of the delay. See 9 Moore's Federal Practice paragraph 208.06; Kountze v. Omaha Hotel Co., 107 U.S. 378, 394, 2 S.Ct. 911, 925, 27 L.Ed. 609 (1882), and Moore v. Townsend, 577 F.2d 424 (7th Cir. 1978).

The minimum amount of the bond to be set is a relatively simple calculation based upon the record and stipulation filed with this Court for the previous remand hearing.

These amounts to pay all creditors as previously found

by the Court are as follows:

Administrative Expenses	147,017.77
Secured Claims	749,303.39
Uncontested Unsecured claims	133,434.08
Contested Unsecured claims	292,057.52
Other unsecured claims	127,500.00
	$1,449,312.76

In addition, the bond should include the interest that becomes due during appeal. Interest is accruing on the debt at approximately $10,000 per month. Assuming that the accelerated appeal will decide this matter in six months, a minimum of an additional $60,000.00 for a minimum total of $1,509,312.76.

The purpose of the Ninth Circuit's ruling is to protect all creditors of this estate to insure that they will not be forced to weather the storms of the marketability of this parcel of land if the appeal is upheld, or worse if both potential buyers should decide that current economic conditions and interest rates make present development of the property unfeasible. While Cortez has every intention of continuing with their offer, it must, as it is presumed so must Mr. Alberding, monitor the interest rates both interim and long term to determine if development is currently feasible. The Court should be cognizant of the fact that the revenues from development must be sufficient to at a minimum meet the mortgage payments. The failure of the project as it exists to pay the current mortgage led to Mr. Charlton's presence before this Court. Assuredly, neither Cortez Development Corp. nor Mr. Alberding would wish to follow in his shoes. This then could be the biggest danger to this estate from the delay. During the delay, because of economic conditions both Cortez and Alberding could decide to withdraw their offers. Then the creditors would suffer grievously for the stay. The bond should be sufficient so all creditors, including secured creditors are paid as they would

have been had the Cortez sale completed. In no event should the bond be for an amount less than the $1,195.000 for the Cortez offer.

Secondly, the Court must consider the damage for delay that may be caused to Cortez. Cortez should be entitled to its reasonably forseeable damages for delay including the increased costs of interest and construction. See Moore v. Townsend, supra, attached hereto for the Court's review. In April, Cortez was able to obtain permanent financing on the 6.4 million dollar project for 12-1/2%. Today that financing cannot be obtained for less than 13-1/2%. A 1% difference on 6.4 million dollars is a loss of $64,000 per year. The present value of this loss discounted at 10% for 30 years is $606,656.83.*

Secondly, construction costs have averaged an increase of 1-1/2% per month in the Phoenix area. This was previously testified to at the original bond hearing on March 12, 1981. The estimate is that the construction costs on the project will be 3.7 million dollars. The increase is about $55,000 per month. If one again assumes that this appeal can be decided in 6 months the amount needed is $330,000. Cortez' total estimated damages for delay are $909,656.83. Therefore, even if Cortez alone is considered, based upon the authority of Moore v. Townsend, the bond must not be less than one million dollars.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that a bond sufficient to pay all creditors should be fixed at

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*Calculation taken from Interest Table found in Volume 10 of Arizona Revised Statutes.

$1,509,312.76, but in no event less than $1,175.000.00.

RESPECTFULLY SUBMITTED this 29 day of May, 1981.

BURCH & CRACCHIOLO, P.A.

By: _____
JERRY L. COCHRAN
2333 North Central Avenue
Phoenix, Arizona 85004
Attorneys for Cortez

Stanley MOORE and Judith Moore, Plaintiffs-Appellants,

v.

Mary Ryan TOWNSEND and Jane Melnick, Defendants-Appellees.

No. 77-1018.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 9, 1977.

Decided June 6, 1978.

Affirmed as modified.

See also 525 F.2d 482.

On purchasers' claim for damages under supersedeas bond filed by vendor in connection with stay of judgment directing specific performance of contract for the sale of land, the United States District Court for the Northern District of Illinois, Prentice H. Marshall, J., 421 F.Supp. 378, awarded damages to purchasers, and purchasers appealed alleging that award was inadequate. The Court of Appeals, Tone, Circuit Judge, held that: (1) purchasers were entitled to recover the additional interest they would be required to pay by reason of delay in closing as a result of increase in rate of interest; proper measure of damages was the present value of additional interest contained in each monthly payment; (2) purchasers were not entitled to recover for expense incurred when looking for interim dwelling, closing costs for interim dwelling, moving expenses incurred in move to interim dwelling, maintenance and improvements of the interim dwelling, costs of having to sell interim dwelling or costs of moving from interim dwelling to subject property, since such expenses were not reasonably foreseeable consequences of the stay pending appeal; (3) purchasers were entitled to recover loss of capital gain tax benefits attributable to purchasers' inability to purchase subject property within one year of sale of former residence, and (4) trial court did not abuse its discretion in refusing to allow purchasers' claim for attorney fees incurred on appeal on ground that petition for such fees was not filed until after evidentiary hearing had been completed.

1. Appeal and Error ⇐1234(3)

The damages recoverable under bond given to stay execution of judgment ordering the transfer of real property are those damages arising from delay occasioned by the stay pending appeal which are properly the legal damage to party delayed. Fed. Rules Civ.Proc. rule 62(c), 28 U.S.C.A.

2. Appeal and Error ⇐1234(1, 5)

A supersedeas bond provides compensation for those injuries which can be said to be the natural and proximate result of the stay; costs covered are those costs of appeal that are taxed as such by appellate court. Fed.Rules Civ.Proc. rule 62(c), 28 U.S.C.A.

3. Damages ⇐226

To avoid overcompensation, award of future damages should be discounted to its present value.

4. Appeal and Error ⇐1234(7)

Pursuant to supersedeas bond filed by vendor in connection with stay of judgment directing specific performance of contract for sale of real estate, purchasers were entitled to recover the additional interest they would be required to pay by reason of delay in closing as result of increase in rate of interest; proper measure of damages was the present value of additional interest contained in each monthly payment. Fed. Rules Civ.Proc. rule 62(c), 28 U.S.C.A.

5. Appeal and Error ⇐1234(3)

Pursuant to supersedeas bond filed by vendor in connection with stay of judgment directing specific performance of contract for sale of real estate, vendors were not entitled to recover expenses incurred when looking for an interim dwelling, closing costs for interim dwelling, moving expenses incurred in move to interim dwelling, various expenses for maintenance and improve-

A-63
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ments of interim dwelling, cost of having to sell interim dwelling and cost of moving from interim dwelling to subject property, in view of fact that such costs were not reasonably foreseeable consequences of the stay pending appeal. Fed.Rules Civ.Proc. rule 62(c), 28 U.S.C.A.

6. Appeal and Error ⇐1231(3)

Pursuant to supersedeas bond filed by vendor in connection with stay of judgment directing specific performance of contract for sale of real estate, purchasers were entitled to recover loss of capital gain tax benefits attributable to purchasers' inability to purchase subject property within one year of sale of former residence. Fed.Rules Civ. Proc. rule 62(c), 28 U.S.C.A.; 26 U.S.C.A. (I.R.C.1954) § 1034.

7. Damages ⇐226

When fact of damages has been established, difficulties and doubts as to amount should be resolved in favor of injured party and against wrongdoer.

8. Appeal and Error ⇐1231(8)

In proceeding to recover damages under supersedeas bond filed by vendor in connection with stay of judgment directing specific performance of contract for sale of real estate, trial court did not abuse its discretion in refusing to award purchasers attorney fees incurred on appeal on ground that petition for such fees was not filed until after evidentiary hearings had been completed.

F. Willis Caruso, Chicago, Ill., for plaintiffs-appellants.

Frank O. Wetmore, II, Chicago, Ill., for defendants-appellees.

Before TONE and WOOD, Circuit Judges, and WYZANSKI, Senior District Judge.*

TONE, Circuit Judge.

We are called upon to review the District Court's award of damages under a supersedeas bond in a fair housing case. Plaintiffs complain that the award was inadequate in certain respects. We modify it in part.

This action began in April 1974 when Stanley and Judith Moore, black citizens of the United States, filed a complaint based on 42 U.S.C. §§ 1982 and 3601 alleging that they had entered into an agreement to buy a house owned by Mrs. Mary Ryan Townsend and that Mrs. Townsend and Jane Meinick, the exclusive sales agent for the property, subsequently had refused to sell to them because of their race. The District Court entered a preliminary injunction restraining the sale of the house to anyone other than the Moores *pendente lite*.

When the Moores' claim came on for trial, they elected to seek specific performance instead of money damages. After hearing the evidence, the court found in favor of the Moores and entered a judgment requiring Mrs. Townsend to sell her house to the Moores for $77,000, with the closing date to be not later than August 1, 1974. On Mrs. Townsend's motion, the District Court ordered a stay pending appeal, conditional on a supersedeas bond of $25,000, which she filed. This court affirmed the District Court's finding of discrimination, as well as an award of attorney's fees. *Moore v. Townsend*, 525 F.2d 1042.

On remand, the District Court ordered that the closing date "shall be on or before December 8, 1975 and possession shall be given at closing." Closing proceeded as scheduled, and subsequently $25,000 from the closing proceeds was placed with the clerk of the court to be deposited in an interest bearing account as the bond for damages caused by the delay attending appeal. Following the taking of evidence, the District Court awarded the Moores $2,311.72 in damages under the supersedeas bond.[1]

* The Honorable Charles E. Wyzanski, Jr., Senior District Judge of the United States District Court for the District of Massachusetts, is sitting by designation.

1. Mrs. Townsend filed a cross-claim against Mrs. Meinick and a third-party complaint against Mrs. Meinick's employer, Jean Spencer Real Estate, Inc., seeking judgment over against them for indemnity for injuries she

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The damage award was based on the following findings: The stay, by precluding a closing on August 1, 1974, deprived the Moores of a $50,000 mortgage loan commitment, under which the loan was to be repaid in 25 years at 7¾ percent interest. At the time of the closing on December 8, 1975, the Moores had to pay 9 percent.[2] The total additional interest that the Moores would have to pay over the 25-year life of the loan would be $10,063.20,[3] which when reduced to its present value comes to $2,343.72. The court refused to allow various other items of damages claimed by the Moores *for reasons* we shall note as we discuss those items.

The Moores challenge the court's interest calculation and disallowance of other items of damages. They acknowledge, however, that in contesting the damage award they are not attempting to reinstitute their previously abandoned claim for money damages based on the fair housing violation, a claim that would be outside the scope of the supersedeas bond.

The Scope of the Bond

The authority for stay of an injunction pending appeal is derived from Rule 62(c), Fed.R.Civ.P. The court granting such a stay may in its discretion require a bond "upon such terms . . . as it considers proper for the security of the rights of the adverse party."[4]

The bond itself is not in the record, and the conditions of the bond are not specified in the order approving it. There appears to be no dispute, however, that the bond is a typical one, covering damages resulting from the stay, as well as costs of the appeal,[5] and we shall assume this to be the case.

[1, 2] The damages recoverable under a bond given to stay the execution of a judg-

would suffer as a result of the litigation on the ground that they, while in a fiduciary relationship, violated the Moores' civil rights. On the court's own motion, these claims were severed for a separate trial pursuant to Rule 42(b), Fed.R.Civ.P., and were tried with the claim for damages under the bond and determined adversely to Mrs. Townsend. The court also ordered Mrs. Meinick to surrender to the Moores for cancellation their $3,000 promissory note as earned money.

2. Appellee asserts that this figure is the result of a clerical error because the loan agreement provides for 8¾ percent interest per annum. This assertion appears to be correct. See text, *infra*.

3. There is an unexplained disparity between the figure the parties seemed to agree was correct, $10,023, and the figure in the text. Presumably because of the nominal amount of the difference, both sides on appeal treat the figure in the text as correct, and we do likewise.

4. Rule 62(d) states that "[w]hen an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule." Subdivision (a) states that

> [u]nless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction . . . shall not be stayed during . . . the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

Subdivision (c) states,

> [w]hen an appeal is taken from . . . [a] final judgment granting . . . an injunction, the court in its discretion may suspend . . . an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

5. The Federal Rules of Appellate Procedure contain no provision governing the conditions of this or any other kind of supersedeas bonds. Supreme Court of the United States Rule 18(1) states,

> When the judgment [stayed pending appeal] determines the disposition of the property in controversy as to real actions, . . . the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest and damages for delay. Substantially the same provision appeared in former Rule 73(d), Fed.R.Civ.P., which governed appeals to the court of appeals before the adoption of the Federal Rules of Appellate Procedure in 1968. The purpose of the bond was recognized in Mrs. Townsend's motion for approval of the bond, when she stated, "[T]he plaintiffs may be adequately compensated by damages for any alleged injuries caused by delay in execution should the aforementioned judgment be affirmed."

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ment ordering the transfer of real property are "those damages arising from the delay occasioned by [the stay pending appeal] which are properly a legal damage to the party delayed." *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 394, 2 S.Ct. 911, 925, 27 L.Ed. 609 (1882). Thus a supersedeas bond provides compensation for those injuries which can be said to be the "natural and proximate result of the stay." *Weiner v. 222 East Chestnut Corp.*, 303 F.2d 630, 634 (7th Cir. 1962). The costs covered are those costs of appeal that are taxed as such by the appellate court. *American Trust Co. v. Speers Sand & Clay Works*, 60 F.2d 994, 997 (D.Md.1932).

Additional Interest

[3, 4] There is no dispute that the additional interest the Moores will have to pay by reason of the delay in closing is an injury legally attributable to the stay. *Weiner v. 222 East Chestnut Corp., supra*, 303 F.2d at 634. To avoid overcompensation, an award of future damages should be discounted to its present value. *Petition of United States Steel Corporation*, 436 F.2d 1256, 1280 (6th Cir. 1970); G. Dobbs, *Remedies*, § 8.7 (1973). The discounting calculation complained of here assumed that all of the additional interest charge could be deferred for 25 years. In fact, however, the Moores must pay part of the additional interest each month (300 monthly payments over 25 years). The proper measure of damages is, therefore, the present value of the additional interest contained in each monthly payment. *Weiner v. 222 East Chestnut Corp., supra*, 303 F.2d at 634; *see* G. Dobbs, *Remedies, supra*.

At oral argument we directed the parties to submit recalculations of the interest damages following the method just stated. Each side submitted a different calculation. The Moores used an interest rate of 9 percent, the rate mentioned in the District Court's opinion, while Mrs. Townsend used 8¾ percent, the rate actually specified in the Moores' mortgage note. The latter rate and Mrs. Townsend's calculation using that rate appear to be correct: Additional monthly interest of $33.41 per month is multiplied by 155.206861, the present value factor of $1.00 per period for 300 periods at 6 percent interest (the legal rate of interest used by the District Court). The amount needed at 6 percent, therefore, to pay an annuity of $33.41 per month for 300 months is $5,185.46.

Appellee attempts to justify the figure used by the District Court by arguing that it represents a discount based on the possibility that the Moores may sell the house and therefore not have to pay the entire additional interest. This argument is refuted by what the court said:

> Mrs. Townsend urges that this element of damage [total additional interest to be paid over the natural life of the loan] is speculative; that the likelihood that the Moores will remain in the subject premises for the life of the loan and thus pay the full amount of increased interest is highly unlikely. . . . It does not lie with Mrs. Townsend to urge that that obligation is in reality a speculative one. We do hold, however, that the gross amount of potential interest liability should be discounted to its present value.

Thus the court, correctly we believe, rejected the argument that an award of damages representing the total additional interest liability would be unduly speculative.

We modify the amount awarded by the District Court for additional interest, increasing that amount to $5,185.46.

Moving Expenses

[5] The Moores also argue that the District Court erred in failing to award certain expenses incurred as the result of having to make an interim move during the appeal because of intolerable living conditions. To escape these conditions, they purchased a townhouse in Wheaton, Illinois, where they lived until they moved into the Townsend house. Before the District Court, they made claims for (1) expense incurred when looking for a new interim dwelling, (2) closing costs for the Wheaton townhouse, (3) moving expenses incurred in move to Wheaton, (4) various expenses for maintenance

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and improvements of the Wheaton townhouse, (5) other miscellaneous expenses, (6) costs of having to sell the Wheaton townhouse, and (7) cost of moving from Wheaton to the Townsend house. We agree with the District Court that items 1-6 are not compensable under the supersedeas bond because they were not reasonably foreseeable consequences of the stay pending appeal. And, any cost incurred as the result of having to move to take possession of the Townsend house is not compensable, since it is an expense that the Moores would have incurred in the absence of the stay.

Income Taxes

The Moores also argue that they should recover the amount of the income tax paid on the capital gain realized on the sale of their prior house in Silver Spring, Maryland. The District Court determined this amount to be $4,500. They contend that but for the supersedeas stay they would have been able to meet the requirements of 26 U.S.C. § 1034[6] and therefore would have avoided paying any tax on the capital gain in their 1974 income taxes. The District Court denied the capital gain tax as an item of damages, because (1) they had not suffered any injury, *i. e.*, § 1034 merely defers the tax and does not forgive it, and (2) in any event they did not seek an extension of time, *i. e.*, did not act to mitigate their damage.

As to mitigation, it appears that the Moores could not have obtained an extension of the one year requirement.[7] We therefore turn to the first ground.

[6, 7] The argument that the tax is only deferred until the Moores resell the Townsend house strikes us as in substance the same argument the court rejected in dealing with increased interest. If the Moores soon sell the house, most of the increased interest cost will not have to be incurred, and, if in addition they fail to repurchase another house within the time and under the terms permitted by the capital gains tax statute, they would have had to pay the deferred capital gains tax if they had not already paid it. It is at least as likely that the Moores will be able to preserve their capital gains tax deferral throughout their lifetimes, either by staying in the same house or by timely purchase of another house (or successive other houses) after sale of that house, as it is that they will remain 25 years in the same house. In any event, as the District Court said about the interest item, it does not lie with appellee to claim that the loss is speculative. The fact of damages having been established, difficulties and doubts as to the amount should be resolved in favor of the injured party and against the wrongdoer.

Attorney Fees

[8] Finally, the Moores claim their attorney fees incurred in the first appeal. It appears from the scanty record before us on this point and from the parties' briefs that the petition for such fees was not filed until after the evidentiary hearing had been completed, and that the court therefore viewed the petition as untimely. We cannot say that relying on this ground to allow the fees was error or an abuse of discretion.

The District Court's order is modified to allow damages for increased interest in the amount of $5,185.16, and for loss of capital gain tax benefits in the amount of $4,500, making a total of $9,685.16. As modified, the order is affirmed.

6. During the period pertinent here 26 U.S.C. § 1034(a) provided that a taxpayer could defer tax liability on the capital gain realized from the sale of his principal residence if he purchased a new residence within one year of the sale of the old residence. Because of the stay, the Moores were not able to purchase the Townsend house within one year of the sale of their former residence, and therefore their capital gain was taxable.

7. Extensions of § 1034(a)'s time limitations are available only when a specific statutory provision so provides. See Rev.Rul. 69-511, 1969-2 C.B. 195 and Rev.Rul. 75-9978, 1975-1 C.B. 258. No such statutory provision is applicable here.

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Maricopa)

GARY G. KELTNER, being first duly sworn upon his oath, deposes and says:

1. I am an adult who is competent to make this Affidavit.

2. This Affidavit is based upon my personal knowledge of the events described.

3. I am one of the attorneys for C. H. Alberding, and have acted on his behalf in that capacity at all times relevant to the events described in this Affidavit.

4. On Wednesday, June 10, 1981, I received by hand delivery a letter from the attorneys for Cortez Development Corp. The letter attached and referenced Cortez' Memorandum of Law Regarding Setting of Bond. In that letter and memorandum, Cortez stated that it would sustain compensable damages which it estimated to be in excess of $900,000 as a result of any delay in the close of Escrow arising from the Stay Order issued by this Court. A true and correct copy of the June 10 letter and memorandum is attached to the Debtor's Response as Exhibit "B".

5. Prior to my receipt of the June 10 letter and attached memorandum, I had not seen nor been informed of any evidence supporting a Cortez damage claim exceeding $40,000, which was the amount previously requested by Cortez and made the subject of an already posted Bond.

6. The June 10 letter caused me, as attorney for Mr. Alberding, serious concern. I communicated that concern to Mr. Alberding and we thereafter discussed the situation with the attorneys for Mr. Charlton. Following those discussions, Mr. Alberding concluded that he was unwilling to assist in posting a $1,000,000 Bond for the benefit of Cortez, although he remained willing to do so for the benefit of the creditors of the estate.

LAWYERS
FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

Prior to my receipt of the June 10 letter, my communication of its contents to Mr. Alberding that same date, and the discussions which followed, Mr. Alberding was in the process of assisting Mr. Charlton in obtaining a Bond of which Cortez also was to be a beneficiary.

Gary G. Keltner

GARY G. KELTNER

SUBSCRIBED AND SWORN to before me this 1st day of July, 1981.

Carol Johnson

Notary Public

My Commission Expires:

June 11, 1982

LAWYERS
FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re RICHARD CHARLTON, Debtor.	No. CIV 81-295 PHX WPC
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al, Defendants.	CASH BOND

KNOW ALL MEN BY THESE PRESENTS:

I, Richard Charlton, am held and firmly bound unto The Creditors of the Estate of Richard Charlton, Debtor in proceedings under Chapter XI of the Bankruptcy Act presently pending in the Bankruptcy Court of the District of Arizona and entitled No. B 79-890 PHX VM, in the full sum of One Million Dollars ($1,000,000) in lawful money of the United States of America to be paid to the said Creditors, their heirs, executors, administrators, successors and assigns for the payment of which well and truly to be made, I hereby bind myself, my heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, on the 8th day of April, 1981, the United States District Court for the District of Arizona, Judge William P. Copple presiding, entered a judgment affirming a February 12, 1981 order of the Bankruptcy Court for the District of Arizona approving a sale of certain real property.

WHEREAS, the Debtor has appealed to the United States

Court of Appeals for the Ninth Circuit from the above-mentioned judgment and the whole thereof, and

WHEREAS, on May 19, 1981 the United States Court of Appeals for the Ninth Circuit entered an order staying the bankruptcy court's order of February 12, 1981; pending appeal conditioned upon the posting of a bond adequate to pay Creditors; and

WHEREAS, the amount of the bond has been stipulated to be $1,000,000;

NOW, THEREFORE, if for any reason the appeal is dismissed or if the April 8, 1981 judgment of the District Court is affirmed, any damages that may be suffered by the Creditors of the Estate of Richard Charlton as a result of the stay order entered by the Court of Appeals shall be satisfied in such amount however as shall not exceed the amount of this bond, but if the Debtor shall prosecute his appeal with effect, this bond shall be of no force and effect.

IN WITNESS WHEREOF, the said Richard Charlton has signed these presents this 12th day of June, 1981.

RICHARD CHARLTON

Approved this ____ day of June, 1981:

Honorable Vincent Maggiore
Judge, United States
Bankruptcy Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re RICHARD CHARLTON, Debtor.	No. CIV 81-295 PHX WPC
JAMES P. DUNLAVEY, Receiver, Plaintiff, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al, Defendants.	SUBMISSION OF CASH BOND

Richard Charlton herewith submits his Cash Bond, together with a Cashier's Check of the Valley National Bank of Arizona payable to the Clerk of the United States Bankruptcy Court in and for the District of Arizona for the protection of Creditors of the Estate of Richard Charlton, but not for the protection of Cortez Development Corp., in the sum of One Million Dollars ($1,000,000.00).

You are authorized and directed to invest the monies comprising the bond in such manner as may be consistent with your rules and regulations and as may from time to time be directed by C. H. Alberding and/or Backstage Club, Inc., who has for my benefit provided the monies comprising the bond. All interest earned and/or other income derived from the principal amount of the bond is to be and remain the property of Mr. Alberding and/or Backstage Club, Inc. and is to be from time to time disbursed to him in accordance with your rules and regulations and such instructions as he may from time to time give. If and when the bond is exonerated, wholly or in part, it is to be returned to Mr. Alberding and/or Backstage Club, Inc. in

accordance with such instructions as you shall receive from them.

The bond is posted in connection with the appeal by me in the above-captioned civil action from the February 12, 1981 order of Bankruptcy Judge Vincent Maggiore herein approving a sale of certain real property and from the April 8, 1981 order of United States District Court Judge William P. Copple affirming Judge Maggiore's order.

Unless and until further instructed by Mr. Alberding and/or Backstage Club, Inc., the Clerk of the Court is directed, as soon as the business of his office allows, to draw his check in the amount of One Million Dollars ($1,000,000) and deliver said check to the Valley National Bank of Arizona for the purchase of a Certificate of Deposit at the rate of interest then obtaining. The Clerk is to present said check and a letter in substantially the form annexed as Exhibit A to _____ _____. In return, the Clerk is to receive an indicia of ownership of a Certificate of Deposit payable to: United States Bankruptcy Court for the District of Arizona, Trustee, No. C 79-890 PHX VM. Said Certificate of Deposit is to be held in the Registry of the Court. Upon maturity of said Certificate, the principal amount plus accrued interest shall be reinvested by the said Valley National Bank of Arizona in a new Certificate of Deposit for the same length of time as the original Certificate and at the prevailing interest rate. This procedure will be followed at the maturity of each Certificate unless Mr. Alberding and/or Backstage Club, Inc. otherwise order.

_____
RICHARD CHARLTON

EXHIBIT A

Dear

Enclosed is _____ check #_____ in the amount of _____ payable to the _____ _____. In return for this check, please issue a _____day certificate of Deposit which is payable to:

United States Bankrupty Court
for the District of Arizona
Clerk of the Court, Trustee
No. B 79-890 PHX VM

Please remit the indicia of ownership of the Certificate of Deposit to me at the following address:

Virginia Fritz, Clerk
United States Bankruptcy Court
for the District of Arizona
Attention: _____, Room _____
Phoenix, AZ 85003

It is requested that, upon maturity, the principal amount plus accrued interest be reinvested in a new Certificate of Deposit for the same length of time at the interest rate then prevailing unless you are otherwise directed prior to maturity. This "roll over" procedure should be followed at the maturity of each Certificate until you are directed otherwise. The initial investment and subsequent reinvestments, if any, will be subject, of course, to the collateral provisions of Treasury Circular 176.

Thank you for your cooperation in this matter.

Very truly yours,

VIRGINIA FRITZ, Clerk

By_____
Deputy Clerk

LEWIS AND ROCA
FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

Gerald K. Smith
Nathan Wolf
Debtor

THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re RICHARD CHARLTON, Debtor	No. 79-890-PHX VDM MOTION FOR ORDER SETTING SEPARATE BOND FOR CORTEZ DEVELOPMENT CORP.
JAMES P. DUNLAVEY, Receiver, Plaintiff, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	

Richard Charlton, the Debtor herein, moves this Court as follows:

1. On April 8, 1981, the United States District Court for the District of Arizona, Judge William P. Copple presiding, entered a Judgment affirming a February 12, 1981 Order of the Bankruptcy Court for the District of Arizona approving a sale of certain real property.

2. The Debtor took a timely appeal from the April 8, 1981 Judgment, which appeal is scheduled to be heard by the U.S. Court of Appeals for the Ninth Circuit in August, 1981.

3. On April 20, 1981, the U.S. Court of Appeals for the Ninth Circuit entered a twenty-one day stay of the Bankruptcy

EXHIBIT E

Court's Order of February 12, 1981. In paragraph (c) of that Order, the Court stated:

> In order to secure the creditors and Cortez Development Corp. for any damages that might be caused because of this delay, the stay is conditioned upon Appellant's filing in the District Court, within four (4) days from the entry of this Order, a Bond in the amount of Forth Thousand ($40,000.00) Dollars.

This Bond amount was agreed to by Cortez Development Corp. as accurately reflecting their exposure at that time. The amount also included interest on the underlying obligation.

4. Pursuant to this Order, the Debtor filed in the District Court a Surety Bond in the amount of Forty Thousant ($40,000.00) Dollars running in favor of the creditors and Cortez Development Corp. That Bond is still in place.

5. On May 19, 1981, the U.S. Court of Appeals for the Ninth Circuit entered an Order indefinitely staying the consummation of the sale of the subject real property. That Order, provided in relevant part:

> (a) The Bankruptcy Court's Order of February 12, 1981 is stayed pending appeal. The stay is conditioned upon Appellant's posting of a Bond in an amount that is fully adequate to pay all creditors. The Bankruptcy Court shall determine the amount of the Bond and the time within whic which it must be posted;".

6. Pursuant to this Order, this Court subsequently entered an Order setting the Bond at $1,000,000.00.

7. On June 12, 1981, the Debtor filed with the District Court a cash Bond in the amount of $1,000,000.00, running to the

. . .

FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

benefit of all creditors, but not including Cortez Development Corp.

8. After this Bond was filed, on June 12, 1981, the U.S. Court of Appeals for the Ninth Circuit ruled that the Debtor's Bond should run not only to the benefit of all creditors, but also to the benefit of Cortez Development Corp., the buyer of the property under the Order involved in the appeal. The Debtor's Bond having been declared inappropriate by this Order, the Debtor has moved on June 15, 1981 to withdraw the $1,000,000.00 Bond.

9. The Debtor is prepared to immediately post a reasonable Bond to secure Cortez Development Corp. for any damages that might be caused until the resolution of the Debtor's appeal. There has been no judicial determination that the full amount, or any major portion of the $1,000,000.00 Bond must run to the benefit of Cortez.

10. The Debtor therefore moves this Court for an Order setting a separate Bond amount for Cortez Development Corp., which amount should not exceed $70,000.00. In the alternative, the Debtor moves this Court for an Order increasing the amount of the $40,000.00 Surety Bond presently in place under which Cortez is the beneficiary up to a maximum of $70,000,00.

11. To speed resolution of this crucial issue, the Debtor requests an expedited hearing on this Motion.

RESPECTFULLY SUBMITTED this _____ day of June, 1981.

LEWIS AND ROCA

By _____
Gerald K. Smith
Neal L. Wolf
Attorneys for Debtor.

FIRST NATIONAL BANK PLAZA
ONE HUNDRED WEST WASHINGTON STREET
PHOENIX, ARIZONA 85003
TELEPHONE 602/262-5311

FILED

JUN 18 1981

CLERK
U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	)	
	)	
RICHARD CHARLTON,	)	
	)	
Debtor.	)	B-79-890 PHX VM
	)	
JAMES P. DUNLAVEY, Receiver,	)	B-79-890 "L" PHX VM ✓
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al.,	)	
	)	
Defendants.	)	ORDER DENYING MOTION

After having carefully considered the history of this case, the pleadings, hearings and the proposed "MOTION FOR ORDER SETTING SEPARATE BOND FOR CORTEZ DEVELOPMENT CORP.", promulgated by the attorneys for the debtor in this matter, therefore the Court now

ORDERS that said Motion shall be and is DENIED.

DATED: June 18, 1981

JUDGE

Copy of the foregoing
mailed this 18th day
of June, 1981, to:

Gerald K Smith/Neal L. Wolf, Lewis and Roca, First National Bank Plaza, 100 W. Washington Street, Phoenix, Arizona 85003
Jerry Cochran/Michael C. Pierce, Burch & Cracchiolo, P.O. Box 13528, Phoenix, Arizona 85002
John N. Vogel, 7119 First Ave., Scottsdale, Az. 85251
Timothy W. Barton, Jennings, Strouss & Salmon, 111 W. Monroe, 18th Floor, Phoenix, Az. 85003
Philip S. DiMatteo, Boscoe, Ross & DiMatteo, 2100 First Federal Building, 3003 N. Central Ave., Phx., Az. 85012
Steven Feola, Smith & Feola, 14th Floor, Financial Center, 3443 No. Central Ave., Phx., Az. 85012
Dennis I. Wilenchik, Smith & Feola, 14th Floor, Financial Center, 3443 N. Central Ave., Phx., Az. 85012

FFF—Sandstone
3-5-79—17SM—800

Donald L. Gaffney, Streich, Lang, Weeks,, 100 W. Washington, Suite 2100, Phoenix, Az. 85003
Peter J. Rathwell, Snell & Wilmer, 3100 Valley Center, Phoenix, Arizona 85073
John Arnold, Cr. Mgr., Goettl Air Conditioning, % Charles F. Muehlbauer, 2005 E. Indian School, Phx,, Az. 85012
Internal Revenue Service, 2120 No. Central Ave., Phx., Az. 85012
U. S. Attorney's Office, 230 No. First Ave., #4000, Phx., Az.
James H. Colter, Blake & Colter, 2200 No. Central, Suite 104, Phoenix, Az. 85004
Ron Kilgard, Martori, Meyer, Hendricks & Victor, 3500 Valley Bank Center, Phx., Az. 85073
Phoenix Security Systems, Inc., Rabern Enterprises, Inc., % William C. Wulfers, Jr. 7119 First Ave., Scottsdale, Az. 85251
Wayne N. Howard, Welliever, Smith & Howard, 2544 No. 7th St., Phoenix, Arizona 85005
Arthur Schreiber, 4801 No. 7th St., Phx., Az. 85014
Daniel Cracchiolo/Edwin C. Bull, Burch & Cracchiolo, 2333 No. Central, Phoenix, Arizona 85004
Michael P. McKnight, 2833 No. 3rd St., Phx., Az. 85004
Anthony R. Lucia, Treon, Warnicke, Dann & Roush, 919 No. First St., Phoenix, Arizona 85004
William C. Penn, First Federal Savings Building, 3003 No. Central Avenue, Phoenix, Arizona 85012

Deputy Clerk

When recorded, mail to:
Jerry L. Cochran,
ERSKI & CHATFIELD, P.A.
P.O. Box 11520
Phoenix AZ 85002

PIONEER NATIONAL TITLE INSURANCE COMPANY

15324 K 480

USLIFE

80-62489

TRUSTEE'S DEED OF REAL PROPERTY

THIS INDENTURE made of the 17th day of JUNE, 1981, between JAMES P. DUNLAVEY, Trustee in the matter of Richard Charlton [illegible], Debtor in proceedings for Bankruptcy No. 79-890 PHX VM, Party of the First Part, and SEVENTH CAMEL ASSOCIATES, an Arizona joint venture, Party of the Second Part:

Partnership

WITNESSETH:

The Party of the First Part by virtue of the power and authority given in and by the United States District Court for the District of Arizona, and in consideration of TEN DOLLARS ($10.00) and other valuable consideration, paid by the Party of the Second Part, does hereby grant, convey and release unto the Party of the Second Part, and assigns forever, the following described real property:

PARCEL NO. 1:

The South 130 feet of Lot 8, of LINCOLN PLACE, per map recorded in Book 3, Page 65 of Maps, in the office of the County Recorder of said county;
EXCEPT the West 7 feet as conveyed to the City of Phoenix, by Deeds recorded in Docket 3692, Page 50, and in Docket 3692, Page 52.

PARCEL NO. 2:

That part of Lot 9, of LINCOLN PLACE, per map recorded in Book 3, Page 65 of Maps, in the office of the County Recorder of said County, described as follows:
BEGINNING at the intersection of the center line of Highland Avenue with the center line of 7th Street as shown on said plat of Lincoln Place, said point being the Southeast corner of the Northeast quarter of the Northeast quarter of Section 21 Township 2 North Range 3 East of the Gila and Salt River Base and Meridian, thence North along the center line of 7th Street 519.88 feet to the true point of beginning; thence North 89 degrees 55 minutes East to a point on the East line of said Lot 9, distant 519.84 feet North of the Southeast corner of the Southeast quarter of the Northeast quarter of the Northeast quarter of said Section 21, thence Northerly along the East line of said Lot 9, a distance of 139.84 feet, more or less, to the Northeast corner of Lot 9; thence South 89 degrees 55 minutes West along the North line of Lot 9, a distance of 666.42 feet, more or less to the Northwest corner of the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 21, being in the center line of 7th Street; thence Southerly along center line of 7th Street; 139.88 feet to the point of beginning;
EXCEPT that part lying within 7th Street; and
ALSO EXCEPT the West 7 feet of the North half of said Lot 9, as conveyed by Quit-Claim Deed recorded May 12, 1961, in Docket 3695, Page 52, by Quit-Claim Deed recorded May 12, 1961 in Docket 3695, Page 53, by Quit-Claim Deed recorded May 12, 1969 in Docket 3695, Page 54 and by Quit-Claim Deed recorded May 12, 1961 in Docket 3695, Page 55.

together with the appurtenances and also all the estate which the Party of the First Part has or has power to convey or dispose of as Trustee in the matter of Richard Charlton [illegible], Debtor in proceedings for Bankruptcy.

EXHIBIT G

DKT 15324 PG 491

SUBJECT TO: All taxes, assessments, easements, restrictions, liens and encumbrances of record.

IN WITNESS WHEREOF, the Party of the First Part has hereunto set his hand and seal the day and year first above written.

James F. Dunlavey

JAMES F. DUNLAVEY, as and only as Trustee in the matter of Richard Charlton [redacted] Debtor in proceedings for Bankruptcy.

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this 17th day of JUNE, 1981, before me personally appeared JAMES F. DUNLAVEY, Trustee in the matter of Richard Charlton [redacted], Debtor in proceedings for Bankruptcy No. 79-890 PHX VM, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Judy Klawonn
Notary Public

My commission expires:

7-24-82

JUDY K. KLAWONN

JUN 19 [illegible]

STATE OF ARIZONA,
County of Maricopa } ss

I hereby certify that the within instrument was filed and recorded at request of [illegible]

in Docket [illegible]
on page [illegible]
Witness my hand and official seal the day and year aforesaid.
Bill Henry
County Recorder
By [illegible]
Deputy Recorder

5.00

-2-

BURCH & CRACCHIOLO, P.A.
2333 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004
TELEPHONE (602) 252-7701

Attorneys for

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re	CASE NO. 79-890 PHX VM
RICHARD CHARLTON, Debtor.	AMENDED ORDER APPROVING SALE OF REAL PROPERTY FREE AND CLEAR OF LIENS AND ENCUMBRANCES WITH LIENS AND ENCUMBRANCES TO ATTACH TO PROCEEDS AND APPROVAL OF COMPROMISE SETTLEMENT WITH LESSEES
	(This Order is to be filed in both the Administrative file and Adversary "L").

The above matters, having come before the Court, upon the Receiver's complaint to sell real property free and clear of liens and encumbrances, with liens and encumbrances to attach to the proceeds and Receiver's application to sell real property free and clear of liens and encumbrances, with liens and encumbrances to attach to the proceeds, and upon the joint application of the Receiver and the Lessees to compromise the claims of Morey Levine, Byron H. Lasky, dba Sombrero Playhouse Company and Camelback Theatres, Inc., and such matters having been properly noticed to creditors and all other interested parties by notice of sale dated January 13, 1981, setting the hearing upon Receiver's application to sell property and Receiver's proposal to compromise and settle claims. Present at said hearing were James P. Dunlavey, Receiver, together with his attorney, Jon N. Vogel; Richard Charlton, Debtor, together with his attorney, Gerald Smith; Peter Rathwell, representing General Leasing Company; Michael C. Pierce, representing Cortez

Development Corporation; William Piatt, representing Enterprise Leasing Company; Anthony Lucia and Ronald Warnicke, representing Morey Levine and Byron Lasky; Tim Barton, representing First Arizona Mortgage and Investment Company; Gary Keltner, representing Mr. Alberding together with approximately twenty (20) creditors being present personally and through their counsel, and the Court having heard the argument of counsel and statements by the Debtor and others and being fully advised, the Court makes the following findings:

1. That the Debtor commenced these proceedings as a Chapter XI proceeding by filing a petition on May 7, 1979, and the first meeting of creditors was held on June 12, 1979, at which time the Debtor appeared and was examined, and such first meeting of creditors was then continued to August 3, 1979, at which time such first meeting of creditors was again held and continued upon each of the following dates: September 6, 1979, September 20, 1979, October 3, 1979, November 9, 1979, December 20, 1979, January 30, 1980, April 7, 1980, June 16, 1980, July 1, 1980, September 8, 1980, October 6, 1980, October 10, 1980, December 10, 1980, January 19, 1981, and February 2, 1981, at which continued first meeting of creditors, the Court concurrently heard the applications herein. Interested parties and counsel were heard at all continued meetings.

2. That an emergency meeting of creditors was requested by the Receiver, noticed to all creditors, and held on April 22, 1980.

3. That no plan was filed by the Debtor, or anyone on his behalf, for a period of approximately one (1) year, and that upon the filing of a plan, such plan failed because it did not contain the requisite number of acceptances which resulted in an Order of Adjudication, dated September 11, 1980.

4. That the Debtor, upon a motion to reconsider, was granted sixty (60) days in which to file a plan and that a Second

Amended Plan was filed with the Court within said sixty (60) days, but there are serious and substantial problems connected therewith, including the following:

a. The Second Amended Plan includes within the same classification unsecured creditors of the Debtor, as well as relatives and insiders who have been characterized in open court by the Debtor as "investors".

b. That said plan failed in having the requisite acceptances if said relatives and "investors" are not counted and that acceptances by relatives and "investors" were conditioned on being treated as a different class from unsecured creditors generally.

c. That Richard Charlton, the Debtor, has attempted to amend the Second Amended Plan in order to provide that the relatives and insiders defer their rights under said plan, but that no formal amendment to said plan has been filed or approved by the Court and that the Second Amended Plan fails in obtaining enough acceptances if said relatives and "investors" are not in the same class.

d. That no written amendment to the Second Amended Plan has been filed, although proper and adequate notice was given to all parties.

e. That the offer to purchase for the sum of ONE MILLION ONE HUNDRED SEVENTY FIVE THOUSAND DOLLARS ($1,175,000.00) brought before the Court by the Receiver will result in a substantially larger payment to unsecured creditors than would result under the Debtor's Second Amended Plan as filed and as orally amended at the hearing.

f. The Court further finds and concludes upon the record of proceeding held December 10, 1980, in connection with a duly noticed hearing to determine acceptances of the Second Amended Plan, that the Second Amended Plan, even

as the Debtor might propose to amend it, is not feasible and is not fair and equitable.

5. The Court further finds and concludes that it is in the best interest of the creditors that the application for sale free and clear of liens and encumbrances with liens and encumbrances to attach to the proceeds be granted in view of the considerations set forth at the various hearings and proceedings before this Court including the hearing on February 2, 1981, and specifically in view of the following:

a. The receiver was directed by the Court at several earlier continued first meetings to solicit offers for the sale of real property, and no formal objection to said solicitation was filed or lodged by the Debtor, or anyone else, prior to the application to sell free and clear of liens and encumbrances.

b. The high interest rate on secured claims has caused the claims of the secured creditors to increase rapidly and to jeopardize the security of the unsecured creditors and junior secured creditors.

c. Cortez Development Corporation was unwilling to keep its offer open beyond the February 2, 1981, hearing date unless the sale were forthwith approved and confirmed and there were no other purchasers willing to make a purchase offer at said sum despite the diligent efforts of the receiver to sell said property.

d. The proposals by the Debtor were vague, uncertain, conditional, and predicated upon amendments to the Second Amended Plan that were not feasible.

e. No unsecured creditor, except relatives of the Debtor, characterized in open court by the Debtor as "investors" opposed the proposed sale. All other unsecured creditors who appeared at the meeting or in writing

supported said sale.

f. Neither the Debtor, nor the Debtor's purchaser, under his proposed Second Amended Plan, were willing to make a TWENTY THOUSAND DOLLARS ($20,000.00) earnest money deposit with the Receiver to assure the Court that the offer under the Second Amended Plan would equal or improve the purchase offer which was before the Court.

6. The Court further finds that the Receiver's application to compromise the lease was properly noticed, and no objections were made.

7. This Amended Order is ordered filed nunc pro tunc to specifically set forth for purposes of insuring marketable title the liens, encumbrances, and leases which shall be released from the real property and attach to the proceeds of sale.

IT IS HEREBY ORDERED:

1. That Cortez Development Corporation is the highest and best bidder, to purchase the real property described on Exhibit "A" attached, for the sum of ONE MILLION ONE HUNDRED SEVENTY FIVE THOUSAND DOLLARS ($1,175,000.00), as more fully set forth in the purchase contract and receipt dated February 3, 1981, and attached hereto and marked as Exhibit "B", and said sale is hereby approved and confirmed in accordance with its terms.

2. That the Receiver is granted authority to execute such instruments as may be necessary to convey good title to the purchasers.

3. That said sale shall be free and clear of all liens and encumbrances and leases of any kind including but not limited to the following except only subject to the easements of record now showing on the preliminary title report, which liens, encumbrances and leases to attach to the proceeds of sale:

a. Deed of Trust between Richard Charlton Trustor and First Arizona Mortgage and Investment Company,

an Arizona corporation, as Beneficiary, dated April 18, 1978, recorded April 20, 1978, in Docket 12852, page 323. Beneficial interest assigned to United Bank of Arizona by instrument recorded in Docket 12852, page 335.

b. Security Agreement and Assignment executed by First Arizona Mortgage and Investment Company, an Arizona corporation, and Richard Charlton and Helena Productions, Inc., a New York corporation, dated March 23, 1978, recorded April 20, 1978, in Docket 12852, page 335.

c. Deed of Trust between Richard Charlton, Trustor and Byron Lasky and Morey Levine dba Sombrero Playhouse Company, as Beneficiary, dated April 18, 1978, recorded April 20, 1978, in Docket 12852, page 336.

d. Mortgage to Edward F. Babo and Norma Babo, his wife, executed by Richard Charlton, Widower, dated May 10, 1978, recorded May 31, 1978, in Docket 12937, page 1358.

e. Mortgage to Jerry Doyle executed by Richard Charlton, dated March 23, 1979, recorded March 29, 1979, in Docket 13533, page 785.

f. Judgment No. C34252; Richard Charlton, Debtor, Goettle Brothers Metal Products Co., Inc., Creditor; docketed July 8, 1977, recorded in Docket 12323, page 1317.

g. Judgment No. C348696; Richard Charlton, Debtor; Mantori, Meyer, Hendricks and Victor, P.A., Creditor; docketed September 16, 1977, recorded in Docket 12435, page 1155.

h. Judgment B-77-1444; Richard Charlton, Debtor; First National Bank of Arizona, a national banking association, Creditor; docketed March 10, 1978, recorded in Docket 12785, page 955.

i. Judgment No. C380905; Richard Charlton, Debtor;

C & J Foliage, a partnership, Creditor; docketed April 10, 1979; recorded Docket 13680, page 497.

j. Judgment No. C369380; Richard Charlton, Debtor; Orval M. Johnston and Mary Johnston, husband and wife, Creditors; docketed February 27, 1980, recorded in Docket 14271, page 666.

k. Lease by Richard Charlton and Helena Products, a corporation, Lessor, and Morey Levine and Byron H. Lasky, a partnership, dba Sombrero Playhouse Company, Lessees, dated September 6, 1976, as disclosed by instrument recorded in Docket 11929, page 82.

l. Lease by Richard Charlton, a widowed man, individually and as signator and authorized agent for the Trust established for the benefit of Richard Charlton under Article Ninth of the Last Will and Testament of Helena W. Charlton, Lessor, and Restaurant Development Corporation, Lessee, dated May 3, 1979, as disclosed by instrument recorded in Docket 13613, page 1416.

m. Interest of The Pavilion, Inc., an Arizona corporation, interest disclosed by instruments recorded in Docket 13029, page 77 and Docket 13095, page 1371

n. Lease by Phoenix Security Systems, Lessor and The Pavilion, Lessee, as disclosed by instruments recorded in Docket 13029, page 77 and Docket 13095, page 1371.

o. Lease executed by Richard Charlton, Lessor and Arthur H. Schreiber, BDA, Lessee.

p. Interest of Helena Productions, a New York corporation, interest disclosed by instrument recorded in Docket 12852, page 330.

q. Interest of Richard Charlton Enterprises, interest disclosed by instrument recorded in Docket 13843, page 264

r. Lease by Arizona Security Center, an Arizona

corporation, Lessor and Richard Charlton Enterprises, Lessee, recorded in Docket 13893, page 264.

s. Agreement for Purchase from Ed Babo and Norma Babo, his wife, disclosed by instrument recorded in Docket 13032, page 997.

t. Any other liens, claims, leases or encumbrances on file with the United States Bankruptcy Court for the District of Arizona in case Number B 79-890 PHX VM.

4. That proceeds from said sale shall be held by the Receiver, subject to the claims of secured creditors as hereinafter allowed by order of this Court.

5. That the compromise with the Lessee's, Morey Levine and Byron H. Lasky, in the sum of FORTY TWO THOUSAND FIVE HUNDRED DOLLARS ($42,500.00) be and the same is hereby approved, such sums to be paid from the proceeds of the sale of real property approved herein.

6. That the Clerk shall file this order in both the Administrative file and in Adversary "L".

7. This Order shall be entered nunc pro tunc.

DATED this _____ day of _____, 1981.

VINCENT D. MAGGIORE
United States Bankruptcy Judge

COPY OF THE foregoing mailed on this _____ day of _____, 1981, to:

Michael C. Pierce
BURCH & CRACCIOLO, P.A.
P.O.Box 13528
Phoenix, Arizona 85002

Gerald K. Smith
LEWIS & ROCA
First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

Timothy W. Barton
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorney for FIRST ARIZONA MORTGAGE & INVESTMENT COMPANY
and ARIZONA TITLE INSURANCE AND TRUST COMPANY

Philip S. DiMatteo
BOSCO, ROSS & DiMATTEO
2100 First Federal Building
3003 North Central Avenue
Phoenix, Arizona 85012
Attorney for EDWARD F. BABO and NORMA BABO

Paul Tutnick
815 East Camelback Road
Suite 201
Phoenix, Arizona 85014
Attorney for C & J FOLIAGE and JAMES and CATHY TUTTLE

Dennis I. Wilenchik
SMITH & FEOLA, P.C.
14th Floor
Financial Center
3443 North Central Avenue
Phoenix, Arizona 85012
Attorney for JERRY DOYLE

Donald L. Gaffney
STREICH, LANG, WEEKS & CARDON
2100 First National Bank Plaza
100 West Washington
Phoenix, Arizona 85003
Attorney for FIRST NATIONAL BANK OF ARIZONA

Peter J. Rathwell
SNELL & WILMER
3100 Valley Center
Phoenix, Arizona 85073
Attorney for GENERAL LEASING CO.

John Arnhold
Credit Manager
Geottl Air Conditioning, Inc. (Formerly Geottl Bros. Metal Products, Inc.)
c/o Charles F. Muehlbauer
2005 East Indian School Road
Phoenix, Arizona 85012

INTERNAL REVENUE SERVICE
2120 North Central Avenue
Phoenix, Arizona 85004

UNITED STATES ATTORNEY'S OFFICE
230 North First Avenue
Room 4000
Phoenix, Arizona 85025
(representing I.R.S.)

. . .
. . .
. . .
. . .
. . .

James H. Colter
BLAKE & COLTER, P.C.
2200 North Central, Suite 104
Phoenix, Arizona 85004
Attorney for ORVEL M. JOHNSTON and MARY JOHNSTON

Ron Kilgard
MARTORI, MEYER, HENDRICKS & VICTOR
3500 Valley Bank Center
Phoenix, Arizona 85073

PHOENIX SECURITY SYSTEMS, INC.
Rabern Enterprises, Inc.
c/o William C. Wulfers, Jr.
Attorney at Law
7119 First Avenue
Scottsdale, Arizona 85251

Wayne N. Howard
WELLIEVER, SMITH & HOWARD
2544 North Seventh Street
Phoenix, Arizona 85006
Attorney for RESTAURANT DEVELOPMENT CORPORATION

Arthur Schreiber
4801 North 7th Street
Phoenix, Arizona 85014

Daniel Cracchiolo/Edwin C. Bull
BURCH & CRACCHIOLO, P.A.
2333 North Central Avenue
Phoenix, Arizona 85004
Attorney for HORACE and ETHEL STEELE

Michael P. McKnight
2833 North Third Street
Phoenix, Arizona 85004
Attorney for DON M. TYLER

Anthony R. Lucia
TREON, WARNICKE, DANN & ROUSH, P.A.
919 North First Street
Phoenix, Arizona 85004

William C. Penn
FIRST FEDERAL SAVINGS & LOAN ASSOCIATION
3003 North Central Avenue
Phoenix, Arizona 85012

EXHIBIT "A"

PARCEL NO. 1:

The South 130 feet of Lot 8, LINCOLN PLACE, according to Book 3 of Maps, page 65, records of Maricopa County, Arizona;
EXCEPT the West 7 feet thereof.

PARCEL NO. 2:

THAT PART of Lot 9, LINCOLN PLACE, according to Book 3 of Maps, page 65, records of Maricopa County, Arizona, described as follows:

BEGINNING at the intersection of the centerline of Highland Avenue with the centerline of 7th Street as shown on said plat of LINCOLN PLACE, said point being the Southwest corner of the Northwest quarter of the Northwest quarter of Section 21, Township 2 North, Range 3 East of the Gila and Salt River Base and Meridian; thence North, along the centerline of 7th Street, 519.88 feet to the TRUE POINT OF BEGINNING; thence North 89 degrees 55 minutes East to a point on the East line of said Lot 9, distant 519.84 feet North of the Southeast corner of the Southwest quarter of the Northwest quarter of the Northwest quarter of said Section 21; thence Northerly, along the East line of said Lot 9, a distance of 139.84 feet, more or less, to the Northeast corner of Lot 9; thence South 89 degrees 55 minutes West, along the North line of Lot 9, a distance of 666.42 feet, more or less, to the Northwest corner of the Southwest quarter of the Northwest quarter of the Northwest quarter of Section 21, being the centerline of 7th Street; thence Southerly, along centerline of 7th Street, 139.88 feet to the POINT OF BEGINNING;
EXCEPT that part lying within 7th Street; and
EXCEPT the West 7 feet of said Lot 9.

TO 2046 B AZ D (3-76)

Schedule B

This policy does not insure against loss or damage by reason of the following:

Part I

Reservations contained in the Patent to said land as set forth in Clause No. A-2 shown on the reverse side of this page.

Part II

A. 1981 taxes, a lien, but not yet due and payable.

1. The liabilities and obligations imposed upon said land by reason of inclusion within the Salt River Project Agricultural Improvement and Power District and agricultural improvement districts. (All assessments due and payable are paid.)

2. Easement for telephone lines, as more particularly described in Book 58 of Miscellaneous, page 442. (Parcel No. 2)

PATENT RESERVATIONS

IF ONE OR MORE OF THE FOLLOWING IS APPLICABLE TO THE LAND DESCRIBED HEREIN THE CLAUSE NUMBER OR NUMBERS IS INDICATED IN SCHEDULE 3 OF THIS POLICY ON THE REVERSE SIDE OF THIS PAGE.

A. Reservations, exceptions and provisions contained in the Patent from the United States of America, as follows:

(1) Subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

(2) Subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts; and also subject to the rights of a proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

(3) Subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts; and there is reserved from the land hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916. (39 Stat., 862).

(4) Subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts, but excepting rights of way over, across and through said lands for canals and ditches, constructed, or to be constructed, by its authority, all in the manner prescribed and directed by the Act of Congress approved August 30, 1890, (26 Stat., 391). To secure payment to the United States of America or its successors in the ownership or control of the works constituting and appertaining to the said reclamation project, all sums due, or to become due the United States of America or its successors in the control of said reclamation project in connection with said land and water rights, a lien prior and superior to all other liens, claims or demands whatsoever upon the lands herein and hereby described and conveyed, upon all water rights thereto appurtenant, and upon the right to receive and use water from the reservoirs and canals of said reclamation project is expressly reserved.

(5) No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper or to any valid claim or possession held under the existing laws of Congress.

(6) There is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

B. Reservations, exceptions and provisions contained in the Patent from the State of Arizona, as follows:

(1) Excepting and reserving unto the United States rights of way for ditches and canals constructed by their authority.

(2) This Patent is issued subject to any and all easements or rights of way heretofore legally obtained and now in full force and effect.

(3) Excepting and reserving unto the United States rights of way for ditches and canals constructed by their authority, and subject to any existing easements or rights of way of record.

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Order No. 101652

REQUIREMENTS:

1. PAYMENT of the Salt River Valley Water Users' Association charges.

2. PAYMENT of ALL 1980 taxes. (Parcel No. 155-21-48. [illegible] Year: $5,604.56, plus penalties on first half, Sch. Dist. No. 3850: VAL: [illegible] 0710, IMPR 10010, PERS 0, EXEMPT 0) (PRIOR TAXES ARE PAID EXCEPT AS SHOWN)

PAYMENT of ALL 1980 taxes. (Parcel No. 155-21-60. [illegible] Year: $8,822.88, plus penalties on first half, Sch. Dist. No. 3850: VAL: [illegible] 1790, IMPR 36055, PERS 0, EXEMPT 0) (PRIOR TAXES ARE PAID EXCEPT AS SHOWN)

PAYMENT of 1979 taxes, in the amount of $5,573.30, plus penalties. (PRIOR TAXES ARE PAID EXCEPT AS SHOWN) (Parcel No. 155-[illegible])

PAYMENT of 1979 taxes, in the amount of $8,146.88, plus penalties. (PRIOR TAXES ARE PAID EXCEPT AS SHOWN) (Parcel No. 155-[illegible])

PAYMENT of 1978 taxes by redemption from Certificate of Purchase No. 78003620, in the amount of $5,389.60, including additional costs to April 30, 1981, AND RECORDATION of Certificate of Redemption. (Parcel No. 155-21-48)

PAYMENT of 1978 taxes by redemption from Certificate of Purchase No. 78003622, in the amount of $10,436.40, including additional costs to April 30, 1981, AND RECORDATION of Certificate of Redemption. (Parcel No. 155-21-60)

3. REDEMPTION from Certificate of Sale No. 5544, issued on the Sale of the within property for non-payment of assessment due under Series No. 1037, Assessment No. 2. (Parcel No. 1)

4. RECORD Deed of Partial Release and Partial Reconveyance from Arizona Title Insurance and Trust Company, an Arizona corporation, as Trustee, to the person or persons legally entitled thereto, releasing and reconveying all rights acquired by Deed of Trust between Richard Charlton, Trustor, and First Arizona Mortgage & Investment Company, an Arizona corporation, as Beneficiary, dated April 18, 1978, recorded April 20, 1978, in Docket 12852, page 323. Beneficial interest assigned to United Bank of Arizona, by instrument recorded in Docket 12852, page 335.

5. RECORD RELEASE by First Arizona Mortgage & Investment Company, an Arizona corporation, of Security Agreement and Assignment executed by Richard Charlton and Helene Pertsetione, Inc., a New York corporation, dated March 23, 1978, recorded April 20, 1978, in Docket [illegible] page 333.

6. RECORD Deed of Partial Release and Partial Reconveyance from Arizona Title Insurance and Trust Company, an Arizona corporation, as Trustee, to the person or persons legally entitled thereto, releasing and reconveying all rights acquired by Deed of Trust between Richard Charlton, Trustor, and Byron Lasky and Harry Levine dba Hombrero Plaza Shopping Center Company, as Beneficiary, dated April 18, 1978, recorded April 20, 1978, in Docket 12852, page 336.

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Order No. 101652

REQUIREMENTS - Cont.

7. RECORD RELEASE by Edward F. Babo and Norma Babo, his wife, of Mortgage executed by Richard Charlton, a widower, dated May 10, 1978, recorded May 31, 1978, in Docket 12937, page 1358.

8. RECORD RELEASE by Jerry Doyle, of Mortgage executed by Richard Charlton, dated March 23, 1979, recorded March 29, 1979, in Docket 13533, page 785.

9. SATISFACTION of Judgment No. C342752; Principal amount $11,564.00, plus costs. Richard Charlton, Debtor; Goettl Brothers Metal Products Co., Inc., Creditor; Norling, Rolle, King & Oeser, Attorneys for Creditor; docketed July 8, 1977, recorded in Docket 12323, page 1317.

10. SATISFACTION of Judgment No. C348696; Principal amount $_____, plus costs. Richard Charlton, Debtor; Martori, Meyer, Hendricks & Victor, P.A., Creditor; Martori, Meyer, Hendricks & Victor, P.A., Attorneys for Creditor; docketed September 16, 1977, recorded in Docket 12435, page 1155.

11. SATISFACTION of Judgment No. B-77-1444; Principal amount $9,000.00, plus costs. Richard Charlton, Debtor; First National Bank of Arizona, a national banking association, Creditor; Streich, Lang, Weeks, Cardon & French, Attorneys for Creditor; docketed March 10, 1978, recorded in Docket 12785, page 955.

12. SATISFACTION of Judgment No. C380905; Principal amount $4,000.00, plus costs. Richard Charlton, etal, Debtor; C & J Foliage, a partnership, et al, Creditor; Steven Feola, Attorneys for Creditor; docketed April 10, 1979, recorded in Docket 13680, page 497.

13. SATISFACTION of Judgment No. C369380; Principal amount $5,500.00, plus costs. Richard Charlton, Debtor; Orvel M. Johnston and Mary Johnston, husband and wife, etal, Creditor; Gordon E. Dudley, Attorneys for Creditor; docketed February 27, 1980, recorded in Docket 14271, page 666.

14. CANCELLATION by Richard Charlton and Helena Productions, a corporation, Lessor, and Morey Levine and Byron H. Lasky, a partnership, dba Sombrero Playhouse Company, Lessees, of Lease dated September 6, 1976, as disclosed by instrument recorded in Docket 11929, page 82.

15. CANCELLATION by Richard Charlton, a widowed man, individually and as signator and authorized agent for the Trust established for the benefit of Richard Charlton under Article Ninth of the Last Will and Testament of Helena W. Charlton, Lessor, and Restaurant Development Corporation, Lessee, of Lease dated May 3, 1979, as disclosed by instrument recorded in Docket 13613, page 1416.

16. PROPER SHOWING as to the interest of The Pavilion, Inc., an Arizona corporation, interest disclosed by instruments recorded in Docket 13029, page 77 and Docket 13095, page 1371, and proper divesting thereof.

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Order No. 101652

REQUIREMENTS - Cont.

17. CANCELLATION by Phoenix Security Systems, Lessor, and The Pavilion, Lessee, of Leases, as disclosed by instruments recorded in Docket 13079, page 77 and Docket 13095, page 1371.

18. MUTUAL CANCELLATION of Lease executed by Richard Charlton, Lessor, and Arthur H. Schreiber, BDA, Lessee.

19. PROPER SHOWING as to the interest of Helena Productions, a New York corporation, interest disclosed by instrument recorded in Docket 12852, page 330, and proper divesting thereof.

20. PROPER SHOWING as to the interest of Richard Charlton Enterprises, _____, interest disclosed by instrument recorded in Docket 13843, page 264, and proper divesting thereof.

21. CANCELLATION by Arizona Security Center, an Arizona corporation, Lessor, and Richard Charlton Enterprises, Lessee, of Lease disclosed by instrument recorded in Docket 13843, page 264.

22. RECORD Certificate of Partnership of Seventh Canal Associates, a partnership.

(The right is reserved to make additional exceptions and/or requirements upon examination of all documents submitted in satisfaction of Requirement No. 22.)

23. RECORD DEED from Ed Babo and Norma Babo, his wife, to the Owners Insured, (necessary because of Agreement to Purchase disclosed by instrument recorded in Docket 13032, page 997.)

24. FURTHER PROPER PROCEEDINGS in the District Court of the United States, District of Arizona, in the matter of the estate of Richard Charlton, Bankrupt, File No. 79-890, Phoenix, leading up to and including the entry of an Order directing the Trustee to sell the within property, free and clear of Liens, to the Owners Insured.

25. RECORD a Certified Copy of Order called for in Requirement No. 24.

26. RECORD DEED from James P. Dunlavey, Trustee of the estate of Richard Charlton, Bankrupt, to the Owners Insured.

27. FURNISH PLAT of survey of the subject property by a Registered Civil Engineer or registered Land Surveyor, showing proper ties to locating monuments, location of the improvements on the premises, easements, or rights-of-way, over or under the property, together with any encroachments or projections, fences, or any other matters affecting the use and occupancy of the premises, AND CERTIFICATION by said Engineer that there are no other easements or rights-of-way in use or in evidence, over or under the subject property, nor any encroachment of improvements onto contiguous property by the improvements located on the subject

Order No. 101652

REQUIREMENTS - Cont.

28. USUAL INSPECTION by an employee of Pioneer National Title Insurance Company.

(The right is reserved to make additional exceptions and/or requirements upon examination of said inspection.)

29. PROPER SHOWING as to any parties in possession and/or commitments of possession of any portion of said land under unrecorded leases or month-to-month tenancies, and AUTHORIZATION to show such rights of possession in Schedule "B" of the policy of title insurance.

30. RECORD DEED OF TRUST as set forth in Paragraph 3 of Schedule "A".

PARCEL NO. 1:

The South 139 feet of Lot 8, of LINCOLN PLACE, per map recorded in Book 3, Page 65 of Maps, in the office of the County Recorder of said County;
EXCEPT the West 7 feet as conveyed to the City of Phoenix, by Deeds recorded in Docket 3692, Page 50; and in Docket 3692, Page 53.

PARCEL NO. 2: 90'x95'

That part of Lot 9, of LINCOLN PLACE, per map recorded in Book 3, Page 65 of Maps, in the office of the County Recorder of said County, described as follows:
BEGINNING at the intersection of the center line of Highland Avenue with the center line of 7th Street as shown on said plat of Lincoln Place, said point being the Southwest corner of the Northwest quarter of the Northwest quarter of Section 21 Township 2 North Range 3 East of the Gila and Salt River Base and Meridian; thence North along the center line of 7th Street 319.89 feet to the true point of beginning; thence North 89 degrees 55 minutes East to a point on the East line of said Lot 9, distant 319.84 feet North of the Southeast corner of the Southwest quarter of the Northwest quarter of the Northwest quarter of said Section 21; thence Northerly along the East line of said Lot 9, a distance of 139.84 feet, more or less, to the Northeast corner of Lot 9; thence South 89 degrees 55 minutes West along the North line of Lot 9, a distance of 666.43 feet, more or less to the Northwest corner of the Southwest quarter of the Northwest quarter of the Northwest quarter of Section 21, being in the center line of 7th Street; thence Southerly along center line of 7th Street; 139.88 feet to the point of beginning;
EXCEPT that part lying within 7th Street; and
ALSO EXCEPT the West 7 feet of the North half of said Lot 9, as conveyed by Quit-Claim Deed recorded May 12, 1961 in Docket 3693, Page 52, by Quit-Claim Deed recorded May 12, 1961 in Docket 3693, Page 53, by Quit-Claim Deed recorded May 12, 1961 in Docket 3693, Page 54 and by Quit-Claim Deed recorded May 12, 1961 in Docket 3693, Page 55.

Best Copy Available

EXHIBIT "A"

PURCHASE CONTRACT AND RECEIPT

Phoenix, Arizona - February 3, 1981

The Buyer is Cortez Development Corporation and/or Nominee. The Seller is the District Bankruptcy Court, James P. Dunlavey, Receiver, represented by Jon Vogel, Attorney at Law. This Contract was approved by the Bankruptcy Court on February 2, 1981.

Buyer hereby agrees to purchase the entire four +/- acre parcel known as the Sombrero Playhouse property located at 4747 and 4801 North 7th Street, Phoenix, Arizona, tax assessors' parcels 155-21, -48, -60.

Price

Buyer agrees to pay one million one hundred seventy five thousand dollars ($1,175,000) for the property, payable as follows:

$25,000 earnest money, payable to James P. Dunlavey, Receiver;

$695,000 on or before April 15, 1981, at 5:00 p.m.;

$455,000 on or before September 27, 1981, at 5:00 p.m.

Contract

This written document is the entire agreement between the parties. Any conflicts between this and any verbal representations or prior written documents, this Contract shall control. Both parties agree to execute other documents as may be required by the Bankruptcy Court to effectuate this sale.

Title

Seller shall convey by a Trustee's Deed granting clear and marketable title. There shall be no leases, liens, or other claims against the property whether recorded or unrecorded. Buyer accepts the property subject only to the easements now showing on the Preliminary Title Reports attached hereto and made a part hereof as Exhibits "A" and "B."

Possession

As of February 2, 1981, Buyer has access to the property, and both Debtor and Creditor will cooperate in obtaining whatever tests, research, or studies are necessary for Buyer's pre-development activities. Buyer shall have title and possession upon payment of the $695,000 to be paid on or before April 15, 1981. The Bankruptcy Court shall be secured for payment of $455,000 by Note and Deed of Trust.

Buildings/Personalty

Seller shall retain salvage rights to all buildings, equipment, contents, furnishings, fixtures, and any other personal property now on the property. All such buildings and personal property must be removed by June 1, 1981, and if it is not removed by then, Buyer shall have full title authority and control over the property and everything of any kind whatsoever thereon to do with as Buyer wishes.

Binding Effect

The provisions hereof shall inure to the benefit of and shall be binding upon the respective heirs, personal representatives, successors, and assigns of both parties.

Brokerage

Buyer has no obligation to pay any brokerage commission on this transaction. Buyer is informed that Mr. Charlton, the Bankrupt, may have created an obligation to Mutual Realty Trust. This amount shall be determined by and paid by the Court or its Trustee.

Further Documentation

Buyer and Seller each agree to execute any further documents or instruments necessary to carry out the purpose of this Contract.

Remedies

If Buyer defaults, forfeiture of the amounts paid to the Bankruptcy Court shall be the Seller's sole remedy. In the event Seller breaches any of its obligations or warranties hereunder, then Buyer shall be entitled to such remedies as it may have at law or equity, including the right of specific performance.

Time Essence

Time is of the essence of this Agreement.

Deposit

The earnest money shall be held in an interest-bearing account by the Trustee in the Bankruptcy Court. The interest shall accrue to the benefit of the Buyer.

Notices and Demands

All notices, requests, and demands, and other communications under this Agreement shall be in writing and shall be deemed to have been delivered on the date of service, served personally on the party, or the date of deposit of

such notice in the United States mail, properly addressed as follows:

DATED this 3rd day of February, 1981.

SELLER

U.S. DISTRICT BANKRUPTCY COURT

By James P Dunlavey

DATED this 3 day of February, 1981.

BUYER

CORTEZ DEVELOPMENT CORPORATION

By

LAW OFFICES
BURCH & CRACCHIOLO, P.A.
2333 NORTH CENTRAL AVENUE · PHOENIX, ARIZONA 85004 · TELEPHONE (602) 252-7701

FRANK HAZE BURCH
PAUL D. LEVIE
JAMES B. CROOK, JR.
JOHN F. DAY
ARDA B. RUTHERFORD
JERRY L. COCHRAN
DARYL D. HANNART
IAN NEALE
MARTIN T. JONES
EDWIN C. BULL
JOHN C.B. HITSCHE

DANIEL CRACCHIOLO
C. MICHAEL PIERCE
STEPHEN E. SILVER
BRIAN KAVEN
JACK DANIEL KLAUSNER
JOHN B. PATTULLO
MICHAEL F. DIESSNER
TIMOTHY L. PIERSON
DAVID CRAIG WILSON
BRYAN F. MURPHY

PHOENIX OFFICE
MAILING ADDRESS
P.O. BOX 13328
PHOENIX, ARIZONA 85002

SUN CITY OFFICE
BELL PLAZA PROFESSIONAL BLDG.
10451 PALMERAS DR.
SUN CITY, ARIZONA 85373
(602) 974-4798

June 19, 1981

CERTIFIED MAIL

Mr. Arthur H. Schreiber
Arthur Henry Schreiber Architect
4801 North 7th Street
Phoenix, AZ 85014

Re: Charlton Matter

Dear Mr. Schreiber:

On behalf of Cortez Development, the owners of the property which you formerly leased from Mr. Charlton, you are hereby notified that you have until 5:00 p.m., August 3, 1981, to vacate the premises. If you have any claim, your lease has been dealt with through the Bankruptcy Court, and you should communicate with that Court. Mr. Charlton has been notified to remove the buildings, if he wishes to have them, on or before the same date. He may remove the building in which you are located prior to August 3; however, that is a matter between you, Mr. Charlton, and the Bankruptcy Court.

Thank you for your cooperation in this matter.

Sincerely,

C. Michael Pierce

C. Michael Pierce

/ril

xc: Cortez Development Corp.
Case Construction Co.

EXHIBIT I

LAW OFFICES
BURCH & CRACCHIOLO, P.A.
2333 NORTH CENTRAL AVENUE · PHOENIX, ARIZONA 85004 · TELEPHONE (602) 252-7701

FRANK MAZE BURCH
PAUL D. LEVIE
JAMES B. CRO. , JR.
JOHN F. DAY
ARDA S. RUTHERFORD
JERRY L. COCHRAN
DARYL D. HANNART
IAN NEALE
MARTIN T. JONES
EDWIN C. BULL
JOHN C.B. NITSCHE

DANIEL CRACCHIOLO
C. MICHAEL PIERCE
STEPHEN E. SILVER
BRIAN RAVEN
JACK DANIEL KLAUSNER
JOHN G. PATTULLO
MICHAEL F. DIESSNER
TIMOTHY L. DIERSON
DAVID CRAIG WILSON
BRYAN P. MURPHY

PHOENIX OFFICE
MAILING ADDRESS
P. O. BOX 13228
PHOENIX, ARIZONA 85002

SUN CITY OFFICE
BELL PLAZA PROFESSIONAL BLDG.
10451 PALMERAS DR.
SUN CITY, ARIZONA 85373
(602) 974-4788

June 19, 1981

CERTIFIED MAIL

Mr. Richard Charlton
Richard Charlton Enterprises
4801 N. 7th Street
Phoenix, AZ 85014

Re: Charlton Matter

Dear Mr. Charlton:

On behalf of Cortez Development, the title owner of the Sombrero Playhouse Property, this is notice that you have 45 days from the date of this letter to remove all buildings and personalty from the site. All buildings and personalty which are not removed by 5:00 p.m., August 3, 1981, will be removed by my client.

Thank you for your cooperation in this matter.

Sincerely,

C. Michael Pierce

/ril

xc: Gerald K. Smith/Neal L. Wolf
Cortez Development Corp.
Case Construction Co.

EXHIBIT J

A-105

LAW OFFICES
BURCH & CRACCHIOLO, P.A.
2333 NORTH CENTRAL AVENUE · PHOENIX, ARIZONA 85004 · TELEPHONE (602) 252-7701

FRANK HAZE BURCH
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JOHN F. DAY
ARDA B. RUTHERFORD
JERRY L. COCHRAN
DARYL D. HANNART
IAN NEALE
MARTIN T. JONES
EDWIN C. BULL
JOHN C.B. MITSCHE

DANIEL CRACCHIOLO
C. MICHAEL PIERCE
STEPHEN E. SILVER
BRIAN RAVEN
JACK DANIEL KLAUSNER
JOHN G. PATTULLO
MICHAEL F. DIESSNER
TIMOTHY L. PIERSON
DAVID CRAIG WILSON
BRYAN P. MURPHY

PHOENIX OFFICE
MAILING ADDRESS
P. O. BOX 13528
PHOENIX, ARIZONA 85002

SUN CITY OFFICE
BELL PLAZA PROFESSIONAL BLDG.
10491 PALMERAS DR.
SUN CITY, ARIZONA 85373
(602) 974-4788

June 26, 1981

CERTIFIED MAIL

Galley 7
Attention Norman Mayer
4747 N. 7th Street
Phoenix, AZ 85014

Gentlemen:

My client now owns in fee the Sombrero Playhouse property.

Your name has been given to me by Jon N. Vogel, attorney for the Trustee in Bankruptcy, as representing an interest in personality or fixtures on the site.

You are hereby notified that any and all items in which you claim an interest must be removed on or before August 3, 1981, at 5:00 p.m., or all items on the site will be razed or removed. Your expeditious attention to this notice should relieve any possible damage or misunderstanding when the bulldozers enter the site on August 4, 1981.

Thank you for your cooperation in this matter.

Sincerely,

C. Michael Pierce

CMP/ril

xc: Jon N. Vogel

EXHIBIT K

FOR THE NINTH CIRCUIT

SEP 18 1981

CLERK, U.S. COURT OF APPEALS

In re:
RICHARD CHARLTON,
Debtor.

JAMES P. DUNLAVEY, Receiver,

Plaintiff-Appellee,

vs.

ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al.,

Defendants,

RICHARD CHARLTON,

Debtor-Appellant.

No. 81-5297

DC# CV-81-295 C
Arizona (Phoenix)

ORDER

Before: TANG and EARRIS, Circuit Judges.

Appellee's motion for an award of the attorney fees incurred in connection with this appeal is denied. Appellee's motion for damages for delay is granted. The amount of damages, if any, to which appellee is entitled shall be determined by the bankruptcy court in connection with the remand effected by this court's order of August 5, 1981.

MoCal 7/27/81

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SEP 21 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: RICHARD CHARLTON, Debtor.	No. 81-5297 D.C. # CIV 81-295 PHX WPC U.S. Bankruptcy Court No. B 79-890 PHX VM
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants. RICHARD CHARLTON, Debtor/Appellant.	RESPONSE TO MOTION TO RESERVE CONSIDERATION OF MOTION TO DISMISS DEBTOR'S APPEAL

Cortez Development Corp.,and Seventh Camel Associates, real party in interest, hereby move this Court to deny the debtor's motion to reserve consideration of the motion to dismiss debtor's appeal for the reason that it a further effort by the debtor to delay consideration of this matter, while leaving the estate unprotected by any bond whatsoever.

This response is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 10 day of July, 1981.

BURCH & CRACCHIOLO, P. A.

By _____
Jerry L. Cochran

MEMORANDUM OF POINTS AND AUTHORITIES

It is respectfully submitted that the Court should enter an order denying the motion to reserve consideration of the motion to dismiss debtor's appeal and should grant the motion to dismiss debtor's appeal. The effort by the debtor to have this matter further extended, without a bond protecting the estate, or other appellees, is unconscionable. There is no crucial nature of any issues on this appeal. These matters have already been determined by the Bankruptcy Court, and the debtor has had an appeal to the United States District Court which was decided adversely to him. The issues concern issues of the old Bankruptcy Act that will never be raised again.

The failure of this matter to reach this Court, and being mooted, is the sole responsibility of the debtor/appellant. The debtor has had more than ample opportunity to post his bond. He stipulated to the amount of the bond and the date upon which it must be posted. Rather than post a bond he submitted it and withdrew it. He consciously and intentionally chose to leave this estate unprotected while he submits his appeal. If the debtor objected to the coverage of Cortez Development Corp. under the bond, he could have left his bond on behalf of the estate so that some protection would be afforded, and sought to have the matter reviewed by the Bankruptcy Court and then this Court in a timely manner as to the extent of coverage of Cortez Development Corp., and/or Seventh Camel Associates under the bond. Instead, he is the one who consciously and deliberately chose to go forward with no bond whatsoever in

contravention of the order of this Court and the United States Bankruptcy Court.

This response incorporates by reference the motion to dismiss and the reply to debtor's response to the motion to dismiss as if set forth in full herein.

Therefore, it is respectfully requested that the Court enter an order denying the motion.

RESPECTFULLY SUBMITTED this 10 day of July, 1981.

BURCH & CRACCHIOLO, P. A.

By _____
Jerry L. Cochran
P. O. Box 13528
Phoenix, Arizona 85002
Attorneys for Cortez
Development Corp.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE RICHARD CHARLTON, Debtor.	No. 81-5297 D.C. # CIV 81-295 PHX WPC U. S. Bankruptcy Court No. B79-890 PHX VM
JAMES P. DUNLAVEY, Receiver, Plaintiff/Appellee, vs. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants. RICHARD CHARLTON, Debtor/Appellant.	RESPONSE OF DEBTOR RICHARD CHARLTON TO MOTION FOR CLARIFICATION, AS SUPPLEMENTED, OF CORTEZ

Not long ago, Cortez asked that the appeal of Charlton be dismissed as moot. On August 5, 1981, this Court granted that Motion. Cortez has now filed a Motion for Clarification saying that "if the appeal is to be dismissed as moot for the reason that the sale has closed, then the order of sale should be affirmed, not vacated." (Emphasis added)

This can only be described as a case of mover's remorse. First, Cortez wants the appeal from the order approving sale dismissed because moot, now it wants that order affirmed. If it is to be affirmed, then the appeal

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is alive and well and we should be permitted to argue it. There is no way in which an appeal can be dismissed and affirmed at the same time. The Cortez Motion merely highlights the fact that the dismissal was not appropriate in this stituation. It would be a strange result indeed if the Appellant could be precluded from presenting the reasons why an order should be reversed, but the Appellee nevertheless could turn a moot appeal into an affirmance.

RESPECTFULLY SUBMITTED this 14th day of August, 1981.

LEWIS AND ROCA

By _____
John P. Frank
Gerald K. Smith
Neal L. Wolf
100 W. Washington Street
Phoenix, Arizona 85003
Attorneys for Debtor/Appellant

8/17/81
19/ril

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: RICHARD CHARLTON, Debtor,	No. 81-5297
JAMES P. DUNLAVEY, RECEIVER, Plaintiff/Appellee, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants, RICHARD CHARLTON, Debtor/Appellant.	D.C. #CIV 81-295 PHX WPC U. S. Bankruptcy Court No. B 79-390 PHX VM MOTION FOR APPELLEE CORTEZ DEVELOPMENT CORP. FOR DAMAGES FOR DELAY

Appellee, Cortez Development Corp./Seventh Camel Associates, an Arizona joint venture, successor, and real party in interest, hereby moves this Court for an order pursuant to 28 U.S.C. §1912 for damages incurred by delay, and Rule 38 of the Rules of Civil Procedure for damages for delay for frivolous appeal or its attorneys' fees. This motion is supported by the attached Memorandum of Points and Authorities, and is brought pursuant to Rule 27 of Federal Rules of Appellate procedure and Rule 6 of the United States Court of Appeals for the Ninth Circuit and is supported by the record herein.

Respectfully submitted this 18 day of August, 1981.

BURCH & CRACCHIOLO, P.A.

By _____
Jerry L. Cochran
2333 N. Central Avenue
Phoenix, AZ 85004

MEMORANDUM OF POINTS AND AUTHORITIES

General Background

This matter rose from an appeal from the debtor, Richard Charlton, from an order of the Bankruptcy Court dated February 12, 1981, approving the sale of the property free and clear of all liens to Cortez Development Corp. for the sum of $1,175,000.00. This order was subsequently affirmed by the United States District Court for the District of Arizona, The Honorable William P. Copple, by order dated April 8, 1981.

On or about May 19, 1981, this Court entered an order staying the Bankruptcy Court's order of February 12, 1981, pending the appeal. The stay was conditioned upon the debtor's posting of a bond in an amount that was fully adequate to pay all creditors, including this appellee. By stipulation of the parties and order of the Bankruptcy Court, a bond was set in the amount of $1 million to be posted on or before June 12, 1981. No bond was posted at that time nor has it been posted to date. Because the debtor's bond did not fulfill the requirements of the May 19, 1981 order, the sale of the property closed pursuant to the original order of the Bankruptcy Court of February 12, 1981, on or about June 19, 1981. Thereafter, a motion to dismiss was filed by the appellee citing Royal Properties, Inc. v. Cassidy, 621 F. Suppl 984 (9th Cir. 1980) and other decisions. This motion was frivolously opposed by the appellant, Richard Charlton. A motion dismissing the appeal as moot was granted by this Court on or about July 31, 1981 (Amended and vacated August 5, 1981.)

Legal Argument

It is respectfully submitted that pursuant to 28 U.S.C. §1912 and Federal Rules of Appellate Procedure 38, that appellee, Cortez Development Corp./Seventh Camel Associates, successor and real parties in interest, should be entitled to substantial damages for delay as a result of this appeal.

It is respectfully submitted that the original appeal was frivolous for the reasons set forth in the appellee's answering brief. The numerous motions and bulk of work on this matter was no more than an attempt by appellant to coerce the appellees to withdraw their offer of sale because the costs and expenses would be too burdensome to them.

In any event, clearly after the appellant failed to post a bond, opposition to the motion to dismiss the appeal as moot was clearly frivolous, and the appellee should be entitled to damages for delay and their attorneys' fees incurred after that time period.

Attached hereto as Exhibit 1 is an analysis of the damages for delay that Cortez Development Corp./Seventh Camel Associates, successor in interest, have incurred for the delay as a result of this appeal for their inability to develop this property in a timely fashion as of April 15, 1981, the date that this sale was originally scheduled to close but for the appeal.

Secondly, the sale in fact closed on June 19, 1981. From that date, because of actions of the appellant in opposing the dismissal of this appeal, the appellees have been unable to

utilize their property because of the potential cloud on the title of the property by the appellant. Furthermore, appellant has remained in possession of the property and is utilizing it for storage of his equipment and office use. As a result of this inability to use the property, Seventh Camel Associates have incurred interest in the amount of $42,911.15 from June 17, 1981 until August 14, 1981. Appellee should be awarded the reasonable rental value of the property to be paid to them by the appellant for the time appellant has remained upon the property since June 19, 1981.

Based upon the foregoing and the record in this matter to date, it is respectfully submitted that this Court enter an order that appellee is entitled to damages for delay incurred during the pendency of this appeal in the amount to be proven upon proper hearing of this matter.

Respectfully submitted this 18 day of August, 1981.

BURCH & CRACCHIOLO, P.A.
Attorneys for Cortez
Development Corp.

By _____
Jerry L. Cochran
2333 N. Central Avenue
Phoenix, AZ 85004

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2333 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004
TELEPHONE (602) 252-7701

Attorneys for Cortez Development Corp.

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

IN RE: RICHARD CHARLTON, Debtor/Appellant, JAMES P. DUNLAVEY, Receiver/Plaintiff, v. ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al., Defendants.	NO. B 79 890 PHX VH B 79 890 L PHX VH MEMORANDUM OF LAW REGARDING SETTING OF BOND.

CORTEZ DEVELOPMENT CORP., through counsel undersigned presents this Memorandum to the Court to aid the Court in setting the amount of the Supersedeas bond. This matter is being heard by this Court on remand from the Ninth Circuit to set the bond "in an amount fully adequate to pay all creditors." In addition, this Court must also pursuant to the rules set a bond adequate to compensate all appellees, including Cortez for damages incurred as a result of the delay. See 9 Moore's Federal Practice paragraph 203.06; Kountze v. Omaha Hotel Co., 107 U.S. 378, 394, 2 S.Ct. 911, 925, 27 L.Ed. 609 (1883), and Moore v. Townsend, 577 F.2d 424 (7th Cir. 1978).

The minimum amount of the bond to be set is a relatively simple calculation based upon the record and stipulation filed with this Court for the previous remand hearing.

These amounts to pay all creditors as previously found

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EXHIBIT 1

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by the Court are as follows:

Administrative Expenses	147,017.77
Secured Claims	749,303.39
Uncontested Unsecured claims	133,434.03
Contested Unsecured claims	292,057.52
Other unsecured claims	127,500.00
	$1,449,312.76

In addition, the bond should include the interest that becomes due during appeal. Interest is accruing on the debt at approximately $10,000 per month. Assuming that the accelerated appeal will decide this matter in six months, a minimum of an additional $60,000.00 for a minimum total of $1,509,312.76.

The purpose of the Ninth Circuit's ruling is to protect all creditors of this estate to insure that they will not be forced to weather the storms of the marketability of this parcel of land if the appeal is upheld, or worse if both potential buyers should decide that current economic conditions and interest rates make present development of the property unfeasible. While Carter has every intention of continuing with their offer, it must, as it is presumed so must Mr. Alberding, monitor the interest rates both interim and long term to determine if development is currently feasible. The Court should be cognizant of the fact that the revenues from development must be sufficient to at a minimum meet the mortgage payments. The failure of the project as it exists to pay the current mortgage led to Mr. Charlton's presence before this Court. Assuredly, neither Carter Development Corp. nor Mr. Alberding would wish to follow in his shoes. This then could be the biggest danger to this estate from the delay. During the delay, because of economic conditions both Carter and Alberding could decide to withdraw their offers. Then the creditors would suffer grievously for the stay. The bond should be sufficient so all creditors, including secured creditors are paid as they would

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have been had the Cortez sale completed. In no event should the bond be for an amount less than the $1,195,000 for the Cortez offer.

Secondly, the Court must consider the damage for delay that may be caused to Cortez. Cortez should be entitled to its reasonably foreseeable damages for delay including the increased costs of interest and construction. See Moore v. Townsend, supra attached hereto for the Court's review. In April, Cortez was able to obtain permanent financing on the 6.4 million dollar project for 12-1/2%. Today that financing cannot be obtained for less than 13-1/2%. A 1% difference on 6.4 million dollars is a loss of $64,000 per year. The present value of this loss discounted at 10% for 30 years is $606,656.83.

Secondly, construction costs have averaged an increase of 1-1/2% per month in the Phoenix area. This was previously testified to at the original bond hearing on March 17, 1981. The estimate is that the construction costs on the project will be 3.7 million dollars. The increase is about $55,000 per month. If one again assumes that this appeal can be decided in 6 months the amount needed is $330,000. Cortez' total estimated damages for delay are $939,656.83. Therefore, even if Cortez alone is considered, based upon the authority of Moore v. Townsend, the bond must not be less than one million dollars.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that a bond sufficient to pay all creditors should be fixed at

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Calculation taken from Interest Table found in Volume 10 of Arizona Revised Statutes.

$1,509,312.76, but in no event less than $1,175,000.00.

RESPECTFULLY SUBMITTED this 29th day of May, 1981.

BURCH & CRACCHIOLO, P.A.

By: _____
Robert L. Cochell
2333 North Central Avenue
Phoenix, Arizona 85004
Attorneys for Corte.

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THE [illegible] BANK

August 13, 1981

Seventh Camel Associates
4423 N. 24th Street
Suite 26
Phoenix, Arizona 85016

Re: Seventh Camel Associates
$1,300,000 loan

Gentlemen:

Pursuant to your request, please be advised the amount of interest that will have accrued on the $1,300,000 loan through August 14, 1981 (and since the initial advance on June 17, 1981), will be $42,911.50.

Sincerely,

Clint Bowling
Asst. Vice President

CB/dsr

Exhibit 2